PETITION NOT PRINTED

# TRANSCRIPT OF RECORD

## Supreme Court of the United States

**OCTOBER TERM, 1960**

## No. 180

HARRY JOSEPH PAYNE, PETITIONER,

*vs.*

PAUL J. MADIGAN, WARDEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

**PETITION FOR CERTIORARI FILED FEBRUARY 5, 1960**
**CERTIORARI GRANTED JUNE 27, 1960**

# Supreme Court of the United States

**OCTOBER TERM, 1960**

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HARRY JOSEPH PAYNE, PETITIONER,

*vs.*

PAUL J. MADIGAN, WARDEN

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

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[fol. 1]

**IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION**

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No. 37967-Civil

HARRY JOSEPH PAYNE, PLAINTIFF

v.

PAUL J. MADIGAN, Warden, United States Penitentiary, Alcatraz, California, DEFENDANT

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EXCERPT FROM DOCKET ENTRIES

*1959*

Jan. 14 Filed petition for writ of habeas corpus.
14 Filed order to show cause, returnable Jan. 22, 1959 (Burke)
• • • •
21 Ordered, hearing on order to show cause continued to Jan. 28, 1959. (Burke)
28 Ordered, hearing on order to show cause continued to Feb. 20, 1959 (Burke)
Feb. 6 Filed motion of plaintiff for immediate issuance of habeas corpus.
20 Hearing on order to show cause. Respondent directed to file return to order to show cause within 20 days and petitioner 5 days thereafter to reply. Case continued to March 20, 1959 for submission. (Harris)
24 Mailed notice to petitioner.
Mar. 3 Filed notice by petitioner of removing proceedings to Court of Appeals.
9 Filed notice (copy of letter) by respondent to petitioner of hearing March 20, 1959 and of availability of counsel
9 Filed return of respondent to order to show cause.

*1959*

| | | |
|---|---|---|
| Mar. | 10 | Filed petition of plaintiff for transfer of case to Court of Appeals, with copy of order of said Court remanding case to US District Court, Northern District of California. (Pope) |
| | 17 | Filed traverse of petitioner to return to order to show cause. |
| | 20 | Hearing on order to show cause. Counsel for defendant to advise petitioner by letter on legal points involved. (Harris) |
| | 23 | Filed notice (copy of letter) by defendant to petitioner of proceedings March 20, 1959. |
| | 31 | Filed reply of petitioner to return to order to show cause. |
| | 31 | Ordered case continued to April 7, 1959 for submission. (Harris) |
| Apr. | 7 | Ordered case continued to April 14, 1959 for submission (Harris) |
| | 14 | Ordered case continued to April 21, 1959 for submission (Harris) |
| | 17 | Filed further argument of defendant on traverse to return. |
| | 21 | Ordered case continued to May 20, 1959 for submission (Harris) |
| May | 13 | Filed reply of petitioner to further argument of respondent. |
| | 19 | Ordered case continued to May 25, 1959 for submission (Harris) |
| | 20 | Mailed notices |
| | 25 | Ordered case continued to May 29, 1959 for submission (Harris) |
| | 26 | Mailed notices |
| | 29 | Ordered after hearing, case submitted (Harris) |
| June | 25 | Filed order denying habeas corpus, dismissing petition and discharging order to show cause (Harris) |
| | 25 | Mailed copies order to petitioner, Warden, DA and Counsel for petitioner. |
| July | 9 | Filed notice of appeal by petitioner |
| | 10 | Mailed notices |
| | 14 | Filed reporter's transcript of hearing on order to show cause, March 20 and May 29, 1959. |

• • • •

[fol. 3] (File Endorsement Omitted)

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION

Civil No. 37967

HARRY JOSEPH PAYNE, PETITIONER

v.

PAUL J. MADIGAN, Warden, United States Penitentiary, Alcatraz, California, RESPONDENT

PETITION FOR A WRIT OF HABEAS CORPUS—Filed January 14, 1959

The petition of Harry Joseph Payne respectfully shows:

I

That he is now imprisoned and restrained of his liberty by Paul J. Madigan, Warden, in the United States Penitentiary at Alcatraz, California, in the jurisdiction of this Court.

II

That the cause and pretense of such imprisonment and restraint, according to the best knowledge and belief of the petitioner, is seven (7) Judgments and Commitments issued under the color and authority of the United States District Court for the Eastern District of Tennessee, Southern Division, in Cases Numbered 10,676, 10,677, 10,678, 10,679, 10,680, 10,681 and 10,682.

III

That said imprisonment and restraint is illegal for the following reasons:

1. The oral judgment is too indefinite, ambiguous and equivocal to sustain consecutive sentences.

2. The petitioner has satisfied the legal portion of his sentence and is entitled to be discharged from the custody of the respondent.

[fol. 4] IV

That petitioner files herewith a memorandum in support hereof, accompanied by a certified copy of the true and complete transcript of the shorthand notes taken by the Official Court Reporter, in evidence of the proceedings had in the above numbered cases, designated "Exhibit A".

V

That no previous application has been made for the writ below prayed.

WHEREFORE, the petitioner prays that a Writ of Habeas Corpus issue, directed to the said Paul J. Madigan, Warden, commanding him to deliver the body of Joseph Payne, together with the cause of such imprisonment and restraint, forthwith, before the Court.

/s/ Harry Joseph Payne
HARRY JOSEPH PAYNE,
Petitioner

*Duly sworn to by Harry Joseph Payne. Jurat omitted in printing. (all in italics)*

[fol. 5]

MEMORANDUM IN SUPPORT OF PETITION FOR A WRIT OF HABEAS CORPUS (omitted in printing)

[fol. 6] EXHIBIT "A" TO PETITION FOR WRIT OF HABEAS CORPUS

Filed Apr. 2, 1956, Byron Pope, Clerk

IN THE UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF TENNESSEE,
SOUTHERN DIVISION

* * *

No. 10,677,
10,678
10,679
10,680
10,681
10,682
Criminal.

UNITED STATES OF AMERICA, PLAINTIFF,

*vs.*

HARRY JOSEPH PAYNE, DEFENDANT.

Chattanooga, Tennessee, March 16, 1956

BEFORE:

The Honorable Leslie R. Darr, Judge.

Came Ass't U. S. Attorney James M. Meek, the defendant and his counsel, Mr. Wilkes T. Thrasher.

THE COURT: We have cases for judgment against one defendant. As I understand Mr. Payne has been before the Court and has waived indictment, being represented by counsel, waived indictment only here and has some transferred under Rule 20. There is some seven cases, is that right, Sir?

GEN'L MEEK: Seven all together.

THE COURT: And there has been no arraignment, is that correct?

GEN'L MEEK: That is correct, your Honor.

* * * *

[fol. 7] THE COURT: Are you ready for arraignment?

MR. THRASHER: Yes, your Honor.

THE COURT: Are you ready for arraignment, Mr. Payne?

DEFENDANT: Yes, sir, I am.

THE COURT: You may proceed, Mr. Clerk. The Clerk is going to inform you as to a summary of the charges in each count in each indictment or information. We will accept your plea of guilty or not guilty to each one as you want to.

[fol. 8] (The defendant was then arraigned separately as to each individual indictment or information and plead as follows:

To Case No. 10,676, defendant plead Guilty;
To Case No. 10,677, defendant plead Guilty;
To Case No. 10,678, defendant plead Guilty;
To case No. 10,679, defendant plead Guilty;
To Case No. 10,680, defendant plead Guilty;
To Case No. 10,681, defendant plead Guilty; and
As to Case No. 10,682, defendant plead Guilty.

* * * *

[fol. 9] THE COURT: At any rate it is quite a serious series of violations, Mr. Payne, and your demeanor and your talk are very appealing to the Court. I cannot see anything in you to indicate any desire of a vicious nature or anti-social nature, I don't see anything of that kind. But, on the other hand, you have committed so many offenses you must have known you would get a sentence.

So, we will proceed. I have considered all you have said about Mr. Payne, Mr. Thrasher. Mr. Payne is the man directly interested. I have gone over all these, looked at the first, tried to study the different counts and tried to study the counts where it was one information where it would be two charges and not double on those.

And the whole series of events figure the maximum punishment would be 66 years and $33,000.00 fine, that is the maximum. I am just telling you that, because you are going get much less than that amount. So the maximum is that, that could be given under the law. Of course I will not give the maximum, but when you have a series of cases you probably get off lighter per

case than you would if on one case. So, I begin with what I think is fair after studying the situation and [fol. 10] hearing you gentlemen on both sides and making some changes as I heard you, I made some changes in my liat in oeder to try to arrive at what is right, making the sentence in each of those cases two years. Also, if there is the count for taking the money orders and one for breaking and entering I have made them concurrent.

The first count of indictment No. 10,676 is a charge of first uttering and publishing as well as having in possession, that is probably two different things, anyway I am just putting one year in each count, concurrent.

No. 10,677 is breaking into a post office at Campaign Illinois, the second count is stealing the money orders at the time. So, I am just putting that as two years on the first count and one year on the other, making it concurrent or making two years for that charge.

No. 10,678 I will have to start back, 10,678 as I have it now is corrected. In that you are charged with breaking into the post office at Nunnelley, Tennessee, secondly stealing property from the postal department, which I assume to be the same offense. And 10,678, two years on the first count, one year on the second count, concurrent. That is the way I have got that.

Now, No. 10,679, is breaking in two different post offices, one at Hurricane Mills and the other one at [fol. 11] Nunnally, the same thing. I have No. 10,679 as two years on the first count, and one year on the second count concurrent.

No. 10,680, is a one-count indictment, breaking into the postoffice at Dukedom, Weakley County, two years on that.

No. 10,681, is from the Eastern District of Wisconsin, cashing two money orders as I get it. One year on each count, concurrent.

And then the last No. 10,682, breaking and entering the postoffice building in the Western District of Missouri that is two years, and all the different indictments will be consecutive. Now, let's see, that is thirteen years, is that correct?

GEN:L MEEK: I figure twelve.

MR. THRASHER: I figure twelve.

CLERK: Thirteen is right.

THE COURT: I figure fourteen. One as I say it was involving the same instance, I took off one.

Did you get it, Mr. Thrasher? 10,676, one year; 10,677 two years; 10,678 two years; 10,679, two years; 10,680 two years, 10,681 is two years; 10,682 is two years, consecutive as to all cases.

GEN'L MEEK: No. 10,681, how is that?

THE COURT: It is two years.

[fol. 12] I believe that is reasonable sentence in view of all the depredations. I do not believe in unusually long terms, but this is a pretty good term. I could easily hike that up to twenty years. That satisfies me. It is my best judgment and my conscience is satisfied. That will be the judgment of the Court.

Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 13] (File Endorsement Omitted)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION

(Title Omitted)

EXCERPT FROM FURTHER ARGUMENT ON TRAVERSE TO RETURN TO ORDER TO SHOW CAUSE—Filed April 17, 1959

• • • •

[fol. 14] As a second matter petitioner now argues that if the sentences in his case are to be served consecutively it would create an illogical sentence since in case No. 10676 the sentence for one year confinement would have to be served in an institution other than a penitentiary; that thereafter he would have to serve eight years in the penitentiary upon cases Nos. 10677, 10678, 10679 and 10680; that thereafter he would have to be recommitted to an institution other than a penitentiary to serve a one year term in case No. 10681; and that finally he would again have to be committed to a penitentiary for the service of the two year term in the last case, No. 10682. The sentence in the first case enumerated has already been served and the petitioner is now serving the next consecutive eight years in a penitentiary. The fact that in the future petitioner shall be committed to an institution other than a penitentiary to serve a one year term in case No. 10681 and then be returned to the penitentiary to serve his last two year term, presents only an administrative problem within the purview of the prison authorities and is not related to a question of law affecting the service of consecutive sentences.

• • • •

[fol. 15] (File Endorsement Omitted)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

No. 37967

HARRY JOSEPH PAYNE, PETITIONER

v.

PAUL J. MADIGAN, Warden, United States Penitentiary, Alcatraz, California, RESPONDENT

ORDER DENYING ISSUANCE OF WRIT—June 25, 1959

Petitioner, confined at Alcatraz Penitentiary, has filed an application for a writ of habeas corpus alleging that he has completed service of the sentence he concedes to be valid and is now entitled to his release.

The sole point raised by petitioner pertains to the nature of the sentence imposed by the trial court in March, 1956, when petitioner pleaded guilty to a series of indictments charging him with theft of postal money orders. Petitioner, then as now, represented by able counsel, received a sentence totalling twelve years on seven different indictments. The manner in which the sentencing court imposed judgment was to deal with each indictment in order. Separate judgments varied from one to two years [fol. 16] for the several indictments. At the conclusion of No. 10,682, the Court said: "And then the last. . . . 2 years, and all the different indictments will be consecutive. Now let's see, that is 13 years, is that correct?"

In the brief discussion which follows the several persons involved sought to clarify the total number of years which was actually 12, rather than 13. The record, however, is clear that the court in its judgment directed that petitioner be confined consecutively on the several indictments for a total sentence of 12 years.

As held in United States v. Daugherty, 269 U. S. 360: "Sentences in criminal cases should reveal with fair certainty the intent of the court and exclude any serious

misapprehensions by those who must execute them." The Daugherty opinion has been applied recently in a case covering separate indictments rather than separate counts. In Cole v. Sanford, 48 F. S. 729, the court sustained a consecutive judgment pertaining to separate indictments which were imposed in a manner similar to that utilized by the trial court in the principal case. Almost identical language has been held to constitute a valid, consecutive judgment in Fleish v. Swope, 226 F.2d 310 in this circuit.

In view of the fact that the trial judge, at the conclusion of his imposition of sentence stated, with clarity, that the defendant would serve the total period of 12 years, the case is distinguishable from United States [fol. 17] v. Patterson, 29 F. 775, and similar cases relied upon by petitioner.

Accordingly, IT IS ORDERED that the issuance of the writ of habeas corpus be, and the same hereby is, DENIED; that the petition be, and the same hereby is, DISMISSED; and the order to show cause be, and the same hereby is, DISCHARGED.

DATED: Jun. 25, 1959.

/s/ George B. Harris
United States District Judge

[fol. 18] (File Endorsement Omitted)

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

(Title Omitted)

NOTICE OF APPEAL—Filed July 9, 1959

The above named petitioner hereby files notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order of the United States District Court for the Northern District of California, entered in the office of the Clerk on the 25th day of June, 1959, denying the writ of habeas corpus petitioned for on the 14th day of January, 1959, and from each and every part of the said order as well as from the whole thereof.

DATED: July 1, 1959

/s/ Harry J. Payne
HARRY JOSEPH PAYNE
Petitioner-appellant
P.M.B. #1235
United States Penitentiary
Alcatraz, California

[fol. 19] IN THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION

(Title Omitted)

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. CALBREATH, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents, listed below, are the originals filed in this Court in the above-entitled case and constitute the record on appeal herein as provided in the Federal Rules of Civil Procedure:

Excerpt from Docket Entries
Petition for Habeas Corpus
Order to Show Cause
Motion for Immediate Issuance of Habeas Corpus
Notice of Petition for Removal of Proceedings to Court of Appeals
Notice by Defendant of Proceedings on March 9, 1959.
Return to Order to Show Cause
Copy of Order from Court of Appeals Remanding Case to United States District Court
Traverse of Plaintiff to Return to Order to Show Cause
Notice (copy of letter) to Petitioner of Proceedings had on March 20, 1959.
Reply of Plaintiff to Response by Defendant to Traverse
Further Argument by Defendant to Return to Order to Show Cause
Reply of Plaintiff to Further Argument by Defendant
Order Denying Issuance of Writ
Notice of Appeal
Reporters' Transcript of Proceedings March 20 and May 29, 1959.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 23 day of July, 1959.

(SEAL) C. W. CALBREATH, Clerk,

By /s/ Margaret Blair
Deputy

[fol. 20] IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 16,552

HARRY JOSEPH PAYNE, APPELLANT

*vs.*

PAUL J. MADIGAN, Warden, United States Penitentiary, Alcatraz, California, APPELLEE

On Appeal from the United States District Court for the Northern District of California Southern Division

OPINION—Jan. 19, 1960

Before: Pope, Hamley, and Koelsch, Circuit Judges

HAMLEY, Circuit Judge:

This is a habeas corpus proceeding involving Harry Joseph Payne, a federal prisoner confined in Alcatraz penitentiary. He is being held to serve twelve years under seven written judgments and commitments. These judgments and commitments expressly provide for seven consecutive sentences to be served in sequence corrsponding to the numbers of the seven criminal cases.

In his application for a writ, Payne alleged that the oral pronouncements from the bench at the time of sentencing were too indefinite, ambiguous, and equivocal to sustain the consecutive sentences as set out in the written judgments and commitments. The district court denied the application, holding that the oral pronouncements were complete and unambiguous, and that they supported the sentences as set out in the written judgments and commitments. Payne appeals, raising here the same questions which he presented in the district court.[1]

[1] Habeas corpus, rather than a Title 28 U.S.C.A. § 2255 proceeding, is the proper remedy. See Butterfield v. Wilkinson, 9 Cir., 215 F.2d 320. If appellant is correct in his view of the law, he is entitled to release since, if the terms are to be considered concurrent rather than consecutive, he has already served the longest term imposed.

[fol. 21] On March 16, 1956, Payne pleaded guilty in the United States District Court, Eastern District of Tennessee, Southern Division, to all counts of six informations and one indictment alleging violations of the postal laws. The court then proceeded to impose sentences from the bench, as quoted in the margin.[2] Subsequently, but on the same day, the court signed and there were filed seven documents entitled "Judgment and Commitment," each of which is in the form prescribed in

---

[2] "'The first count of indictment No. 10,676 is a charge of first uttering and publishing as well as having in possession, that is probably two different things, anyway I am just putting one year in each count, concurrent.

"No. 10,677, is breaking into a postoffice at Campaign [sic], Illinois, the second count is stealing the money orders at the time. So, I am just putting that as two years on the first count and one year on the other, making it concurrent or making two years for that charge.

"No. 10,678 I will have to start back, 10,678 as I have it now is corrected. In that you are charged with breaking into the postoffice at Nunnelley [sic], Tennessee, secondly stealing property from the postal department, which I assume to be the same offense. And 10,678, two years on the first count, one year on the second count, concurrent. That is the way I have got that.

"Now, No. 10,679, is breaking in two different postoffices, one at Hurricane Mills and the other one at Nunnally [sic], the same thing. I have No. 10,679 as two years on the first count, and one year on the second count concurrent.

"No. 10,680, is a one-count indictment, breaking into the postoffice at Dukedom, Weakley County, two years on that.

"No. 10,681, is from the Eastern District of Wisconsin, cashing two money orders as I get it. One year on each count, concurrent.

"And then the last No. 10,682, breaking and entering the postoffice building in the Western District of Missouri that is two years, and all the different indictments will be consecutive. Now, let's see, that is thirteen years, is that correct?

"GEN'L MEEK: I figure twelve.

"MR. THRASHER: I figure twelve.

"CLERK: Thirteen is right.

"THE COURT: I figure fourteen. One as I say it was involving the same instance, I took off one.

"Did you get it, Mr. Thrasher? 10,676, one year; 10,677 two years; 10,678 two years; 10,679 two years; 10,680 two years; 10,681 is two years; 10,682 is two years, consecutive as to all cases.

"GEN'L MEEK: No. 10,681, how is that?

"THE COURT: It is two years."

Form 25, Appendix of Forms, Federal Rules of Criminal Procedure, 18 U.S.C.A.

[fol. 22] The judgment and commitment in criminal case No. 10,676 commits Payne to the custody of the attorney general for imprisonment for a period of one year. The judgment and commitment in criminal case No. 10,677 commits Payne for imprisonment for a period of two years "to begin at the expiration of the sentence imposed this day in Criminal Case No. 10,676." The judgment and commitment in criminal case No. 10,678 commits Payne for imprisonment for a period of two years "to begin at the expiration of the sentence imposed this day in Criminal Case No. 10,677." In like manner sentences of two, two, one, and two years were imposed, respectively, in criminal cases Nos. 10,679 to 10,682, inclusive. As a part of each sentence it was provided that the same would begin at the expiration of the sentence imposed that day in the immediately preceding numbered criminal case.

Payne concedes that the seven written judgments and commitments are unambiguous and expressly state that the seven sentences aggregating twelve years shall be served in the numerical order of the separate cases. He contends, however, that these written judgments and commitments have "no probative value." It is his position that the terms of the sentences depend exclusively upon the oral pronouncements from the bench, and that the latter are ambiguous as to the sequence of consecutive terms.

Rule 32(b), Federal Rules of Criminal Procedure, 18 U.S.C.A., which became effective on March 21, 1946, provides that a judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. The sentence which is set forth in such judgment, however, must have been imposed in the presence of the defendant. Rule 43, Federal Rules of Criminal Procedure. It follows that if the sentence as set forth in the judgment departs in a matter of substance from the oral pronouncement of the sentence, it is void, though subject to correction under Rule 35, Federal Rules of Criminal Procedure.

The order of serving consecutive sentences is a matter of substance. Sentences in criminal cases should reveal with fair certainty the intent of the court and exclude any misapprehension by those who must execute them. In keeping with this principle, it has been held necessary for the court to indicate the sequence of sentences when consecutive sentences are imposed. United States v. Daugherty, 269 U. S. 360.

[fol. 23] The district court thought that the oral pronouncement indicated with sufficient clarity that the consecutive sentences were to be served in the same sequence as the numerical order of the cases. If this is so, then the written judgment and commitments are in complete conformity with the oral sentences.

Had the oral sentences been imposed with regard to the counts of a single indictment or information, we would have no hesitancy in concurring in this determination by the district court.[3] But where, as here, the consecutive sentences pertain to six informations and an indictment, there is authority for the view that a more precise specification of the order of sentences must be indicated than is to be found in the instant oral sentences.[4]

In providing that more precise specification of the order of sentences, the written judgments and commitments entered herein did not depart from the oral pronouncements. At most they resolved an ambiguity. In the oral pronouncements it was indicated that the sentences were to be served consecutively. The manner in which the pronouncements were made indicates that a sequence of sentences corresponding to the numerical order of the cases was probably intended. The written judgments and commitments, signed by the judge on the same day, confirm this inference. In our view written judgments and commitments may properly serve the function of resolving ambiguities in orally pronounced sentences.

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[3] United States v. Daugherty, supra; Fleish v. Swope, 9 Cir., 226 F.2d 310.

[4] Puccinelli v. United States, 9 Cir., 5 F.2d 6; United States v. Patterson, C.C., 29 Fed. 775.

What we have said with respect to the sequence of sentences has equal application with regard to the clarification of the total time to be served, concerning which there was some confusion at the time of sentencing. It also requires rejection of several minor points of ambiguity suggested in appellant's brief.

Affirmed.

[fol. 24] POPE, Circuit Judge.

I concur. The appellant's argument that the written judgments have "no probative value" seems to fly in the face of Criminal Rule 32(b), which, in providing that the "judgment shall be signed by the judge and entered by the clerk" appears to provide that the "judgment of conviction" in a case of this kind is the one signed by the judge.

A statement indicating a contrary view was made in a footnote to Spriggs v. United States, 9 cir., 225 F. 2d 865, 868. Although I participated in that decision, I now think I should express my doubts of its correctness. It was pure dictum, for the order in that case was merely one denying a plea in bar. That case did not concern a "judgment of conviction" which is what Rule 32(b) is about.

• • • •

[fol. 25] IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 16,552

HARRY JOSEPH PAYNE, APPELLANT

*vs.*

PAUL J. MADIGAN, Warden, United States Penitentiary, Alcatraz, California, APPELLEE

JUDGMENT—Jan. 19, 1960

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the order of the said District Court in this cause be, and hereby is affirmed.

(File Endorsement Omitted)

[fol. 26] Clerk's Certificate to foregoing Transcript Omitted in Printing.

[fol. 27] SUPREME COURT OF THE UNITED STATES

No. 729, Misc., October Term, 1959

HARRY JOSEPH PAYNE, PETITIONER

*vs.*

PAUL J. MADIGAN, Warden

On petition for writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—June 27, 1960

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1040 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1960 575502 606

FILE COPY

PETITION NOT PRINTED

Office Supreme Court, U.S.
FILED
JAN 12 1961
JAMES R. BROWNING, Clerk

# IN THE SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1960**

---

## No. 180

---

HARRY JOSEPH PAYNE,

*Petitioner,*

*vs.*

PAUL J. MADIGAN,

*Respondent.*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

---

## BRIEF FOR THE PETITIONER

---

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HOWARD P. WILLENS
*800 World Center Building*
*Washington 6, D. C.*

*Attorneys for Petitioner*

December 30, 1960

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## CITATIONS

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# IN THE SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1960**

## No. 180

HARRY JOSEPH PAYNE,

*Petitioner,*

*vs.*

PAUL J. MADIGAN,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF FOR THE PETITIONER

Contrary to this Court's basic directive that criminal sentences must be imposed with "meticulously precise language," the Court of Appeals permitted an ambiguous sentence pronounced in open court to be cured by clerical documents prepared in the defendant's absence after the conclusion of the judicial proceeding. This lax procedure improperly dilutes and delegates the judge's solemn duty to impose sentence in the presence of the defendant, and invites reaffirmation by this Court of the federal judiciary's responsibility to conduct criminal proceedings with dignity and clarity in order to preserve public confidence in the administration of justice.

## Opinions Below

The opinion of the Court of Appeals (R. 15-19) is reported at 274 F.2d 702 (9th Cir. 1960). The opinion of the District Court for the Northern District of California (R. 10-11) is not officially reported.

## Jurisdiction

The Judgment of the Court of Appeals (R. 20) was entered on January 19, 1960. A motion for leave to proceed *in forma pauperis* and a petition for a writ of certiorari were filed on February 5, 1960, and both the motion and petition were granted on June 27, 1960 (R. 21). Counsel was appointed by order of this Court dated October 10, 1960. The jurisdiction of this Court is founded on 28 U.S.C. §1254(1).

## Question Presented

In sanctioning a patently ambiguous sentence pronounced by the district judge, the Court of Appeals held that "written judgments and commitments may properly serve the function of resolving ambiguities in orally pronounced sentences" (R. 18). Since the defendant's right to be present during all stages of the criminal proceeding affecting his substantive rights is an essential safeguard of our criminal law, the basic question presented is whether written Judgment and Commitment forms prepared in the defendant's absence after the open judicial proceeding may amplify a defective or ambiguous sentence pronounced by the judge.

## Statutes and Rules Involved

Rule 20, Federal Rules of Criminal Procedure:

> A defendant arrested in a district other than that in which the indictment or information is pending against him may state in writing, after receiving a copy of the indictment or information, that he wishes to plead guilty or nolo contendere, to waive trial in the district in which the indictment or information is pending and to consent to disposition of the case in the district in which he was arrested, subject to the approval of the United States attorney for each district. Upon receipt of the defendant's statement and of the written approval of the United States attorneys, the clerk of the court in which the indictment or information is pending shall transmit the papers in the proceeding or certified copies thereof to the clerk of the court for the district in which the defendant is held and the prosecution shall continue in that district.

Rule 32, Federal Rules of Criminal Procedure:

> (a) Sentence. Sentence shall be imposed without unreasonable delay. Pending sentence the court may commit the defendant or continue or alter the bail. Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment.
>
> (b) Judgment. A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The

judgment shall be signed by the judge and entered by the clerk.

Rule 43, Federal Rules of Criminal Procedure:

> The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules.

## Statement

On March 16, 1956, petitioner appeared before the District Court for the Eastern District of Tennessee, Southern Division, for arraignment on six informations and one indictment charging diverse violations of various sections of the postal laws in Tennessee, Illinois, Wisconsin and Missouri over several years (R. 5).[1] Six of these criminal proceedings were before the court for plea and sentence pursuant to Rule 20 of the Federal Rules of Criminal Procedure, whereby petitioner consented to have the cases transferred from the several judicial districts in which the charges were originally filed.

After receiving petitioner's pleas of guilty (R. 6), the district judge imposed sentence. Advising petitioner that "you are going to get much less than" the statutory "max-

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[1] The two counts in No. 10,676 arose in the Eastern District of Tennessee in January, 1956. The two counts in No. 10,677 arose in June, 1954 in the Northern District of Illinois. No. 10,678 arose in the Middle District of Tennessee in April, 1955. No. 10,679 in two counts arose in the Middle District of Tennessee in September, 1955. No. 10,680 arose in the Western District of Tennessee in January, 1956. No. 10,681 arose in the Eastern District of Wisconsin in June, 1954. The last separate case, No. 10,682, arose in the Western District of Missouri in March, 1955.

imum," the judge undertook "to arrive at what is right, *making the sentence in each of those cases two years.*[2] Also, if there is the count for taking the money orders and one for breaking and entering I have made them concurrent" (R. 6-7).

In further detail, the judge observed that the two counts in No. 10,676 were "probably two different things, anyway I am just putting one year in each count, concurrent" (R. 7). In No. 10,677 the court imposed "two years on the first count and one year on the other, making it concurrent or making two years for that charge" (R. 7). In No. 10,678, the judge imposed two years on the first count, and one year on the second count "concurrent" (R. 7). Misreading the information in No. 10,679 as involving "two different post offices, one at Hurricane Mills and the other one at Nunnally, the same thing,"[3] the court imposed "two years on the first count, and one year on the second count concurrent" (R. 7). After setting two years in No. 10,680, the court imposed one year on each of the two counts in No. 10,681 "concurrent" (R. 7). Finally, the court imposed two years in the seventh proceeding, No. 10,682, adding that "all the different *indictments* will be consecutive" (R. 7).

Recapitulating the sentences, the court observed "Now, let's see, that is thirteen years, is that correct?" (R. 7). After the prosecutor questioned this total, and arrived at twelve (R. 7), the clerk interposed that "Thirteen is right" (R. 8). The court then suggested fourteen years as the correct total, declaring "One as I say it was involving the same instance, I took off one" (R. 8).

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[2] Emphasis added throughout unless otherwise indicated.

[3] In fact both counts in No. 10,679 referred to offenses occurring at Hurricane Mills, Tennessee.

At this juncture, the judge summarized for the benefit of counsel:

> "Did you get it, Mr. Thrasher? 10,676, one year; 10,677 two years; 10,678 two years; 10,679, two years; 10,680 two years; 10,681 is two years; 10,682 is two years, consecutive as to all cases" (R. 8).

Since the judge's summary not only amounted to *thirteen* years but also departed from the one year sentence previously imposed in No. 10,681, the prosecutor inquired: "No. 10,681, how is that?" The judge replied:

> "It is two years.
>
> "I believe that is reasonable sentence in view of all the depredations. I do not believe in unusually long terms, but this is a pretty good term. I could easily hike that up to twenty years. That satisfies me. It is my best judgment and my conscience is satisfied. That will be the judgment of the Court" (R. 8).

More than two years after his confinement to the penitentiary, petitioner sought a writ of habeas corpus, challenging the sentencing court's pronouncement "as too indefinite, ambiguous and equivocal" and requesting his release from further imprisonment because he had satisfied the legal portion of his sentence (R. 3). The petition was denied by the district court, which found it "clear" from the record that "the court in its judgment directed that petitioner be confined consecutively on the several indictments for a total sentence of 12 years" (R. 10).

The Court of Appeals for the Ninth Circuit affirmed, though recognizing that the sentence imposed by the judge in petitioner's presence had failed to fix any commencement dates of the several sentences or to determine their sequence. The court postulated that "The order of serving

consecutive sentences is a matter of substance," and that the sentencing court must "indicate the sequence of sentences when consecutive sentences are imposed" (R. 18). Stressing the multiple indictments in this case, the court also cited "authority for the view that a more precise specification of the order of sentences must be indicated than is to be found in the instant oral sentences" (R. 18).

However, to ascertain the "more precise specification" lacking in the judge's pronouncement, the court ultimately resorted to the more detailed contents of the written Judgments and Commitments—which were furnished to the Court of Appeals by the U.S. Attorney *after* the submission of the cause.[4] In the court's opinion, these Judgments and Commitments actually "resolved an ambiguity," for "The manner in which the pronouncements were made indicates that a sequence of sentences corresponding to the numerical order of the cases was *probably intended.* The written judgments and commitments, signed by the judge on the same day, confirm this inference" (R. 18).

Above all, the court decided, "In our view written judgments and commitments may properly serve the function of resolving ambiguities in orally pronounced sentences" (R. 18).

By the same rationale, the Court of Appeals also held that the administrative documents could serve to clarify "the total time to be served, concerning which there was some confusion at the time of sentencing" and to correct other ambiguities resulting from the oral pronouncement of sentence (R. 19).

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[4] On December 29, 1960 the Clerk of the Ninth Circuit telegraphed petitioner's counsel upon request that these judgments, not part of the original record in this case, had nevertheless been considered by the court below, and were hence being certified as a "supplemental record."

## Summary of Argument

Federal courts, which are traditionally vested with plenary discretion in the imposition of criminal sentences, must execute this solemn judicial function in accord with basic procedural safeguards designed to promote fairness to the accused and public confidence in the administration of justice. A fundamental requirement is that sentences pronounced by the judge at the culmination of the proceeding must be stated with clarity in open court in the presence of the defendant. Particularly where several diverse criminal indictments are consolidated for bulk sentencing, the judge must at least specify with "meticulously precise language" how long the defendant must spend in prison, and when each of the several sentences is to begin. In the absence of such a specification, as held by Mr. Justice Bradley's landmark opinion in the *Patterson* case in 1887, multiple sentences on diverse indictments must be construed to run concurrently from the time of judgment.

To be sure, Mr. Justice McReynolds' opinion in the *Daugherty* case in 1926, while expressly preserving the *Patterson* principle for sentences on *multiple indictments*, sanctioned a lesser degree of specificity for sentences based on multiple counts of a *single indictment*. Although reversal of the decision below, which concerns multiple indictments, is thus compatible with *Daugherty*, *Daugherty's* reasoning may well be superseded, in any event, by the detailed specifications for multiple sentences now recommended by the Federal Rules of Criminal Procedure's official forms for judgments and commitments in *all* criminal cases.

Such greater specificity in *all* multiple sentences would not only protect the rights of defendants, but would doubt-

less improve the administration of justice—by promoting dignity and clarity in the sentencing process and abating the present flood of prisoners' challenges to obscure sentencing pronouncements.

The obscure pronouncement by the sentencing judge in this case failed to observe minimal standards of judicial clarity. The sentence is amenable to interpretations of a *total* sentence varying from two to fourteen years, and does not specify when any one of the different sentences in the seven proceedings is to begin in relation to any of the others. Indeed, as suggested by the Court of Appeals, the sentencing pronouncement was not "intelligible" without some "administrative effort" at clarification after the judicial proceeding.[5]

Written Judgments and Commitments prepared in the absence of the accused cannot amplify ambiguous or defective pronouncements by the sentencing judge. Such a resort to administrative forms, prepared *ex parte*, for defining essential elements of criminal sentences operates to nullify the defendant's traditional right to a judicial determination of his sentence in open court. Such a lax procedure, moreover, would mechanize and debase a crucial and solemn element in the federal courts' administration of justice, by relieving the judge of his personal obligation to pronounce criminal sentences with dignity and clarity.

[5] As detailed in note 18, *infra*, the United States Attorney on November 2, 1959 reported to the Director of the Bureau of Prisons that the Court of Appeals during the hearing on petitioner's case suggested that "there should be some administrative effort to correct his sentence to a [sic] intelligible one."

## ARGUMENT

### I.

### A Judicial Pronouncement Imposing Criminal Sentences on Multiple Indictments Must Specify Clearly When Each of the Sentences Begins and Ends.

Federal courts historically exercise wide discretion to impose criminal sentences in the interest of justice. As the climax of any criminal proceeding, imposition of sentence should symbolize the court's solemn consideration of the circumstances of the offense and the character of the individual defendant, after affording the defendant "an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment."[6] In sentencing, as recognized by this Court, "a judge usually moves within a large area of discretion and doubts," *Carter* v. *Illinois*, 329 U.S. 173, 178 (1946), within which he may "adapt the punishment to the degree of crime." *Ex parte De Bara*, 179 U.S. 316, 322 (1900). And so long as the sentencing judge observes the essential formalities and imposes a sentence within the statutory limits, appellate courts will not interfere.[7] Indeed, the imposition of sen-

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[6] F.R. Crim. Proc. 32(a). The exercise of a sound judicial discretion requires "consideration of all the circumstances of the crime" and "the sentencing judge is authorized, if not required, to consider all of the mitigating and aggravating circumstances involved in the crime." *Williams* v. *Oklahoma*, 358 U.S. 576, 585 (1959). In addition, this Court has confirmed that the sentencing court may properly utilize a broad range of information bearing on the defendant's personal history to assist in the exercise of its discretion. *Williams* v. *New York*, 337 U.S. 241 (1949).

[7] *Blockburger* v. *United States*, 284 U.S. 299 (1932); *Granger* v. *United States*, 275 F.2d 127 (5th Cir. 1960); *United States* v. *Rosenberg*, 195 F.2d 583 (2d Cir. 1952), *cert. denied*, 344 U.S. 838 (1952).

[illegible], "probably the most weighty action taken by a judge," may be the only final judicial determination "that is not subject to appellate review or reconsideration."[8]

Protection of the rights of defendants and preservation of public confidence in the administration of justice demand that such plenary discretion be exercised with dignity and clarity by the judge. For a criminal defendant often lacks legal or semantic sophistication, and should at least learn from the sentencing pronouncement whether he must go to prison, and if so, for how long and when.

Thus, in *United States* v. *Daugherty*, 269 U.S. 360, 363 (1926), this Court stressed that criminal sentences "should reveal with fair certainty the intent of the court and exclude any serious misapprehensions by those who must execute them." This Court admonished "the trial courts to require the use of meticulously precise language in all judgment entries," and cautioned that "Especial care is essential where sentences for crime are imposed." *Id.* at 364.[9]

As recognized by the historic opinion of Mr. Justice Bradley in *United States* v. *Patterson*, 29 Fed. 775 (C.C.D. N.J. 1887), these requirements become of mounting concern whenever sentences are imposed in bulk on multiple indictments. The sentencing pronouncement in *Patterson*,

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[8] McGuire & Holtzoff, "The Problem of Sentence in the Criminal Law," 20 B.U.L.Rev. 423, 426 (1940).

[9] See also *Simunov* v. *United States*, 162 F.2d 314 (6th Cir. 1947), emphasizing "that the convict should know with certainty what his punishment is to be, and that a reviewing court should not be called upon to speculate as to what was in the mind of the sentencing judge at the time of the imposition of the penalty. It is imperative in maintaining respect for the judgments of courts that sentences in criminal cases should not be equivocal. This is more vital than the interests of a particular defendant in a criminal case." *Id.* at 315.

while stating that several sentences on multiple indictments "shall not run concurrently," nevertheless failed to state the commencement date of any sentence, or otherwise specify "the order in which they were to run." *Id.* at 777-78. Such a pronouncement was held "uncertain, and incapable of application," for "No intelligence is sufficient to answer the question" as to which sentence applied to which of the several indictments. *Id.* at 778. As Justice Bradley viewed it,

> "If, for any reason peculiar to either of said indictments, as, for example, some newly-discovered evidence, should be a different face put upon the case, so as to induce the executive to grant the prisoner a pardon of the sentence on that indictment, no person could affirm which of the three terms of imprisonment was condoned. If a formal record of any one of the indictments, and the judgment rendered thereon, were, for any reason, required to be made out and exemplified, no clerk or person skilled in the law could extend the proper judgment upon such record. He could not tell whether it was the sentence for the first, the second, or the last term of imprisonment." *Ibid.*[10]

In sum, Mr. Justice Bradley ruled in *Patterson* that "A prisoner is entitled to know under what sentence he is imprisoned," and that the "vague words in question" were

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[10] Similarly, the post-conviction remedies today afforded petitioner by 28 U.S.C. §2255 are "available only to attack a sentence under which a prisoner is in custody." *Heflin* v. *United States*, 358 U.S. 415, 418 (1959); *Williams* v. *United States*, 267 F.2d 559 (10th Cir. 1959), *cert. denied*, 361 U.S. 867 (1959). Any failure to specify with certainty the period of imprisonment under each of several sentences simultaneously imposed therefore clouds realization of the Congressional design to liberalize post-conviction remedies available to federal prisoners. Cf. *United States* v. *Hayman*, 342 U.S. 205, 210-19 (1952).

"insufficient to alter the legal rule that each sentence is to commence at once, unless otherwise specially ordered." *Ibid.*[11]

To be sure, a lesser degree of clarity may perhaps suffice where multiple counts of a *single indictment*, rather than multiple indictments, are involved. Mr. Justice McReynolds' opinion for the Court in *United States* v. *Daugherty*, 269 U.S. 360 (1926), appears to permit the imposition of multiple consecutive sentences to be served in the numerical sequence of the *counts of a single indictment* despite the lack of such an express specification, at least where this was the "reasonable and natural implication" of the judge's pronouncement. But *Daugherty* carefully distinguished and preserved the *Patterson* rationale, stressing that it "grew out of a sentence under pleas of guilty to three separate *indictments*," so that the question "was materially different from the one here presented which concerns counts in one indictment." *Id.* at 363.[12]

A distinction in the degree of specificity required to impose sentence on *multiple indictments*, as contrasted with multiple counts of a *single indictment*, may be supportable

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[11] Congress recognized the importance of avoiding "confusion, uncertainty, and diversity" in federal sentencing practices, and of providing "uniformity as to the time when sentences of federal prisoners shall commence to run," when in 1932 it revised 18 U.S.C. §3568, so that federal sentences "shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of said sentence" or from the time the prisoner is "committed to a jail or other place of detention to wait transportation to the place at which his sentence is to be served." See H.R. Rep. No. 960, 72d Cong., 1st Sess. 1-2 (1932).

[12] The *Daugherty* opinion described *Neely* v. *United States*, 2 F.2d 849 (4th Cir. 1924), as "more nearly in point." *Neely* sustained a general sentence upon *five counts of one indictment*.

by the practicalities behind the different methods of prosecution.[13] Under Rule 8 of the Federal Rules of Criminal Procedure, multiple counts in a single indictment typically denote various facets of a single criminal proceeding built on a single fundamental transgression. A judge's imposition of multiple sentences on such intertwined counts, even if lacking meticulous precision, may gain some illumination from the sequence or contents of the indictment's several counts. No comparable clarification, however, can result from multiple indictments consolidated for sentencing under Rule 20 of the Federal Rules of Criminal Procedure, where no discernible relation among the several indictments exists.[14] Indeed, the complexity of a bulk sentence for diverse and unrelated offenses may enhance the need for greater specificity in the judge's pronouncement, so that the defendant is properly apprised of the nature of his punishment with reference to *each* distinct offense.

But whatever its present validity on its own peculiar facts, the wider rationale of Mr. Justice McReynolds' *Daugherty* opinion of 1926 appears superseded by the more exacting standards codified two decades later by the Federal Rules of Criminal Procedure on the basis of experience in the interim. As reflected in official Form 25 for Judgment and Commitment appended to the Federal Rules of Criminal Procedure, even sentences based on multiple counts

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[13] However, some appellate cases have not recognized the distinction drawn by Mr. Justice McReynolds' *Daugherty* opinion, although not discussing the point or the *Patterson* precedent. *E.g. Barker* v. *Looney*, 261 F.2d 616 (10th Cir. 1958); *Ziebart* v. *Hunter*, 177 F.2d 847 (10th Cir. 1949).

[14] Although indictments or informations may be consolidated for trial under Rule 13 "if the offenses, and the defendants if there is more than one, could have been joined in a single indictment or information," no similar conditions apply to consolidate sentences under Rule 20.

of an indictment should specify expressly "whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding or unserved sentence." Granting the advisory rather than mandatory character of Form 25, these modern provisions nevertheless reflect a considered and authoritative judgment that a higher degree of specificity is appropriate in the imposition of criminal sentences than *Daugherty* tolerated in 1926.[15]

Actually, the *Daugherty* rationale of 1926 may well warrant reassessment and restatement by this Court, thirty-five years later. Unlike the lower trial and appellate courts, this Court "is in a peculiarly strategic position to watch the ebb and flow of criminal litigation."[16] At the very least, the precision in sentencing reflected in Form 25, if made *mandatory* for judges, would surely promote dignity and clarity in the oral pronouncement of criminal sentences, and stem the rising flood of litigation involving legal challenges by prisoners to obscure and rambling pronouncements by judges.[17]

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[15] Compare *Gadsden* v. *United States*, 223 F.2d 627 (D.C. Cir. 1955), holding another aspect of Form 25 to be relevant in interpreting the requirements of Rule 32(a).

[16] Tom C. Clark, Attorney General of the United States, Foreward to New York University School of Law, Federal Rules of Criminal Procedure with Notes and Proceedings of Institute iii (1946).

[17] Particularly in recent years, the interpretation of obscure criminal sentences has been frequently before the lower courts. West Publishing Company's Federal Digest through 1959 devoted approximately 36 pages to decisions occasioned by ambiguous sentencing pronouncements. And one authoritative commentator has concluded that "One of the knottiest questions of criminal procedure is how to tell when sentences are concurrent and when they are consecutive." Orfield, Criminal Procedure From Arrest to Appeal 575 (1947).

## II.

**The Vague Judicial Pronouncement Sentencing Petitioner to Imprisonment Failed to Define the Length and Sequence of the Several Sentences.**

Confused in several significant respects, the obscure pronouncement of the sentencing court fell far short of the minimal standards of clarity required for criminal sentences on diverse indictments.

Thus, in two of the seven separate proceedings the judge imposed conflicting terms of imprisonment for a single offense (see pp. 4-6 *supra;* R. 5-7). Although observing that "all the different *indictments* will be consecutive," the court neglected to specify *when* any one of the sentences in the seven cases were to be served in relation to each other (R. 7). In another of the proceedings, the court failed to impose *any* sentence on one count of the multi-count indictment (*Ibid.*). Utter confusion reigned in court among all present at the sentencing proceeding as to how long or when the judge directed the petitioner to go to prison on the several offenses charged (R. 7-8).

Certainly, the obscure pronouncement of the district judge mocks the "meticulously precise language" required in the solemn imposition of criminal sentences. The Court of Appeals actually commented on the "ambiguities" and lack of that "more precise specification" essential where multiple indictments are joined for simultaneous sentencing, and had to proceed by reference to what the judge "probably intended" (R. 18). Even the prosecutors recognized that this ambiguous judicial pronouncement entailed "administrative effort to correct [petitioner's] sentence to

a [sic] intelligible one," and felt "that twelve years is the longest defensible sentence under the facts herein." [18]

Significantly, the "administrative effort" necessary to render this pronouncement "intelligible" includes the recalculation of such essentials as the commencement date of each of the sentences imposed, and the total years of imprisonment to be served by petitioner.

Even if the judge's pronouncement of sentence were less steeped in confusion, it would flout minimal standards of clarity in a criminal context. For, "Serious uncertainty in criminal sentences must be resolved in favor of liberty," *Aderhold* v. *McCarthy*, 65 F.2d 452, 453 (5th Cir. 1933), and it is a "presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment." *Bell* v. *United States*, 349 U.S. 81, 83 (1955). This Court's "policy of lenity" in interpreting federal criminal statutes *a fortiori* bars reliance on what a judge "probably intended" in sending petitioner to prison upon waiver of trial and consent to consolidated sentencing.[19]

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[18] Letter from Lynn J. Gillard, United States Attorney, to Director, Bureau of Prisons, November 2, 1959. Since subsequent portions of this correspondence were attached to the Brief for the Respondent in Opposition to the Granting of the Petition for a Writ of Certiorari, petitioner has incorporated the entire correspondence as an Appendix to this Brief.

[19] Cf. *Ladner* v. *United States*, 358 U.S. 169, 178 (1958), where this Court held that its "policy of lenity" precludes any interpretation of a criminal statute which increases "the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended."

## III.

**Written Judgments and Commitments Prepared in the Absence of the Accused Cannot Cure Ambiguities and Defects in the Sentencing Pronouncement.**

The written forms of Judgment and Commitment prepared *ex parte* after the conclusion of the open court session cannot amplify the judge's pronouncement of sentence. Such a doctrine would entail improper delegation of solemn judicial functions to administrative officials, and deprive a defendant of his historic right to be present and speak on his own behalf in mitigation of punishment.

As long recognized by this Court, "A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner." *Lewis* v. *United States*, 146 U.S. 370, 372 (1892).[20] Climaxing the entire criminal proceeding, the imposition of sentence is obviously a matter of fundamental concern to the defendant. Codifying an elemental safeguard of Anglo-Saxon jurisprudence, Rule 43 of the Federal Rules of Criminal Procedure expressly affirms the defendant's right to "be present at the arraignment, at every stage of the trial . . . and at the imposition of sentence," and Rule 32(a) assures him the "opportunity to make a statement in his own behalf and to present any information in mitigation of punishment."

Accordingly, a sentencing court cannot change its original pronouncement of sentence later in the defendant's absence. In *Hill* v. *United States*, 298 U.S. 460 (1936), this Court refused to permit instructions by the court to the

[20] See also *Shields* v. *United States*, 273 U.S. 583 (1927); *Hopt* v. *Utah*, 110 U.S. 574 (1884).

clerk to enlarge a commitment beyond the oral pronouncement in open court, stressing that the imposition of punishment "is part of the judicial function" and "must have expression in the sentence." *Id.* at 464. Declining to permit such *ex parte* instructions to "regulate the form or content of the sentence, which is to be recorded by the clerk without addition or amendment," Mr. Justice Cardozo's opinion cautioned that "Something more is needed than a few words of unrecorded talk between a judge and a prothonotary to compass that result." *Id.* at 466. For "The only sentence known to the law is the sentence or judgment entered upon the records of the court," and a "warrant of commitment departing in matter of substance from the judgment back of it is void." *Id.* at 464, 465. See also *Greene* v. *United States*, 358 U.S. 326, 329 (1959).

Indeed, the fundamental requirement that criminal sentences be imposed "with meticulously precise" language is designed to guarantee exact judgments which do not require subsequent amplification. This Court emphasized in *Daugherty* that criminal sentences should be stated with such certainty as to "exclude any serious misapprehensions by those who must execute them." 269 U.S. at 363. Implementing this Court's *Daugherty* directive to prevent cumulation of separate criminal sentences, the Seventh Circuit similarly held that a criminal sentence "should be so complete that to ascertain its meaning it will not be necessary to supplement the written words by either a nonjudicial or ministerial officer." *United States* v. *Denemark*, 138 F.2d 289, 290-91 (7th Cir. 1943).[21]

[21] In opposing a proposed federal indeterminate sentence bill, 52 federal court judges of the 62 replying to a questionnaire stressed that under the bill "all judicial control over the matter of punishment, in the case of serious crimes, is removed, and the matter is left to the unreviewable discretion of an administrative board, which will lack many of the features which have given the public confidence in the courts." Committee on Punishment for Crime, Report to the Judicial Conference 6-7 (1942).

In practical effect, the court below nullified these basic procedural safeguards. Nominally, the court recognized that the "order of serving consecutive sentences is a matter of substance," and acknowledged the "authority for the view that a more precise specification of the order of sentences must be indicated than is to be found in the instant oral sentences" (R. 18). Yet, notwithstanding its recognition that the criminal sentences contained in the judgment and commitment "must have been imposed in the presence of the defendant" (R. 17), the court embraced the novel and far-reaching doctrine that the "written judgments and commitments may properly serve the function of resolving ambiguities in orally pronounced sentences" (R. 18).

This doctrine defies the basic requirement that sentences be imposed in open court. By the theory of the Court of Appeals, written forms of Judgment and Commitment prepared *in absentia*, rather than the judicial pronouncement in the defendant's presence, are dispositive of the actual commencement dates of petitioner's multiple sentences and the extent of his total imprisonment. In effect the court below thus relieved the district judge of his responsibility to climax the criminal proceeding with an unequivocal pronouncement of sentence, and approved resort to *ex parte* documentation for reconstituting the judge's unintelligible directive.[22]

---

[22] Indeed, a district court's "usual custom of having formal judgments entered subsequent to its disposition of the matters in open court" may be permissible only to the extent there is *no variance* between the written forms and the oral pronouncements which they record. *United States* v. *Meredith*, 172 F.2d 745, 746 (7th Cir. 1949).

## Conclusion

Reversal of the sweeping decision below is essential to the fair and dignified administration of criminal justice in the federal courts. As recognized in this Court's landmark *McNabb* decision,

> "Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process of law' and below which we reach what is really trial by force." *McNabb v. United States*, 318 U.S. 332, 340 (1943).

Such "civilized standards of procedure" require that criminal sentences be pronounced by district judges in open court with sufficient clarity that defendants of ordinary intelligence are at least informed, with respect to *each* separate criminal charge, whether they must go to prison, and if so, for how long and when.

Accordingly, the decision below should be reversed and remanded, with direction that the petitioner, having served

the lawful portion of his sentence, be discharged from imprisonment forthwith.[23]

Respectfully submitted,

FREDERICK M. ROWE
HOWARD P. WILLENS
*800 World Center Building*
*Washington 6, D. C.*
*Attorneys for Petitioner*

December 30, 1960

---

[23] As construed in accord with Mr. Justice Bradley's *Patterson* opinion, the instant sentencing pronouncement authorizes no more than two years of imprisonment. Since petitioner has been imprisoned for more than *six* years with appropriate statutory deductions, he is entitled to release from any further illegal detention.

The sentencing court is obviously barred from sentencing petitioner anew so as to increase his sentence after its original imposition and start of service, in the light of the Fifth Amendment's prohibition against double jeopardy. *United States* v. *Benz*, 282 U.S. 304 (1931); *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1874). Courts of Appeals have often rejected belated efforts to cumulate criminal sentences where the original oral pronouncement did not so provide. *Duggins* v. *United States*, 240 F.2d 479 (6th Cir. 1957); *United States* v. *Chiarello*, 214 F.2d 838 (2d Cir. 1954), *cert. denied*, 348 U.S. 702 (1954); *Rutledge* v. *United States*, 146 F.2d 199 (5th Cir. 1944).

## APPENDIX

COPY

JK:mj
C. 21944

November 2, 1959

Director
Bureau of Prisons
Department of Justice
Washington 25, D. C.

Re: Harry Joseph Payne v. Paul J. Madigan, Warden, United States Penitentiary, Alcatraz, California Court of Appeals No. 16,552

Dear Sir:

The Court of Appeals, during the argument of the above case, suggested that although the petitioner did not have a present right to habeas corpus there should be some administrative effort to correct his sentence to a intelligible one. Accordingly, it would seem to us that twelve years is the longest defensible sentence under the facts herein.

We are enclosing a copy of our brief in the instant case which states the facts appellant relies on.

Yours very truly,

LYNN J. GILLARD
*United States Attorney*

By:

JOHN KAPLAN
*Assistant United States Attorney*

Enclosure

COPY

UNITED STATES DEPARTMENT OF JUSTICE
BUREAU OF PRISONS
Washington 25

November 17, 1959

Mr. Lynn J. Gillard
United States Attorney
San Francisco, California

Attention: Mr. John Kaplan
Assistant U. S. Attorney

Dear Mr. Gillard:

Re: Harry Joseph Payne v. Paul J. Madigan, Warden, United States Penitentiary, Alcatraz, California, Court of Appeals No. 16,552

This is in reply to your letter of November 2 referring to a suggestion made by the Court of Appeals during argument of subject's appeal from denial of writ of habeas corpus that an effort be made administratively to clarify his sentence. You indicate your belief that 12 years is the maximum which can be defended.

Payne's sentence has been and is now computed as a total of 12 years, representing 1 year in case No. 10676, 2 years in case No. 10677, 2 years in case No. 10678, 2 years in case No. 10679, 2 years in case No. 10680, 1 year in case No. 10681, and 2 years in case No. 10682, all consecutive.

Sincerely yours,

FRANK LOVELAND
*Assistant Director*

COPY

JK:md

December 2, 1959

Mr. Paul O'Brien, Clerk
United States Court of Appeals
Post Office Building
7th and Mission Streets
San Francisco, California

Re: Harry Joseph Payne v. Paul J. Madigan, Warden, United States Penitentiary, Alcatraz, California, Court of Appeals No. 16,552

Dear Sir:

In view of the fact that the question was raised as to the proper sentence to be recorded for the above appellant, we are enclosing a letter we have received from the United States Bureau of Prisons. As this letter makes clear, the appellant is confined under a 12 year sentence.

Very truly yours,

LYNN J. GILLARD
*United States Attorney*

JOHN KAPLAN
*Assistant U. S. Attorney*

Enclosure

FILE COPY

PETITION NOT PRINTED

Nos. 180, 184

Office-Supreme Court, U.S.
FILED
FEB 9 1961
JAMES R. BROWNING, Clerk

# In the Supreme Court of the United States

OCTOBER TERM, 1960

HARRY JOSEPH PAYNE, PETITIONER

*v.*

PAUL J. MADIGAN, WARDEN
UNITED STATES PENITENTIARY, ALCATRAZ

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

THOMAS E. YOUNG, PETITIONER

*v.*

UNITED STATES

*ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## BRIEF FOR THE RESPONDENTS

ARCHIBALD COX,
*Solicitor General,*
JOHN DOAR,
*Acting Assistant Attorney General,*
RICHARD J. MEDALIE,
HAROLD H. GREENE,
DAVID RUBIN,
*Attorneys,*
*Department of Justice, Washington, D.C.*

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# In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 180

HARRY JOSEPH PAYNE, PETITIONER

*v.*

PAUL J. MADIGAN, WARDEN,
UNITED STATES PENITENTIARY, ALCATRAZ

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

No. 184

THOMAS E. YOUNG, PETITIONER

*v.*

UNITED STATES

*ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## BRIEF FOR THE RESPONDENTS

### OPINIONS BELOW

The opinion of the Court of Appeals in *Payne* (R. (180) 15–19)[1] is reported at 274 F. 2d 702 (C.A. 9).

[1] References to the record in *Payne* v. *Madigan*, No. 180, are prefixed "R. (180)"; and to Petitioner's Brief, "Pet. Br. (180)", followed by the appropriate page designations. References to

The opinion of the District Court for the Northern District of California (R. (180) 10–11) is not officially reported.

The opinion of the Court of Appeals in *Young* (R. (184) 31–36) is reported at 274 F. 2d 698 (C.A. 8). The opinion of the District Court (R. (184) 21–29) is reported at 174 F. Supp. 422 (D. N.D.).

## JURISDICTION

The judgment of the Court of Appeals in *Payne* (R. (180) 20) was entered on January 19, 1960, and in *Young* (R. (184) 37), on February 11, 1960. A motion for leave to proceed *in forma pauperis* and a petition for a writ of certiorari were filed in *Payne* on February 5, 1960, and in *Young*, on March 1, 1960. The motions and petitions were granted on June 27, 1960 (363 U.S. 839; R. (180) 21; R. (184) 38). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the sentencing judges' oral pronouncements from the bench effectively imposed consecutive sentences and effectively disclosed the sequence in which the sentences were to be served.

2. Whether written Judgments and Commitments, signed by the sentencing judges on the same day as the sentences were orally pronounced, may serve the function of clarifying the intent of the sentencing

---

the record in *Young* v. *United States*, No. 184, are prefixed "R. (184)", and to Petitioner's Brief, "Pet. Br. (184)", followed by the appropriate page designations.

courts as to the sequence in which the sentences imposed were to be served.

3. Whether insufficient specifications by the sentencing judges of the sequences in which consecutive sentences were to be served entitle petitioners to be discharged after serving the longest of the sentences imposed.

STATUTE AND RULES INVOLVED

28 U.S.C. 2243: * * *

> A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.
>
> * * * * *
>
> The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

Rule 8, F.R. Crim. P.:

> (a) *Joinder of Offenses.* Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

Rule 32, F.R. Crim. P.:

> (a) *Sentence.* Sentence shall be imposed without unreasonable delay. Pending sentence

the court may commit the defendant or continue or alter the bail. Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment.

(b) *Judgment.* A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge and entered by the clerk.

Rule 36, F.R. Crim. P.:

Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders.

Rule 43, F.R. Crim. P.:

The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence except as otherwise provided by these rules. * * *

Rule 58, F.R. Crim. P.:

The forms contained in the Appendix of Forms are illustrative and not mandatory.

STATEMENT

I. *Payne* v. *Madigan*, No. 180,

On March 16, 1956, petitioner, represented by counsel, appeared before the District Court for the Eastern District of Tennessee, Southern Division, for arraignment on seven informations and indictments (Criminal Case Nos. 10,676 through 10,682) charging various violations of the postal laws (R. (180) 5–7). Taking up the seven proceedings in numerical order, the judge received pleas of guilty in each proceeding (R. (180)6). After asserting that "it is quite a serious series of violations," and that "the maximum punishment would be 66 years and $33,000.00 fine," the judge said that petitioner would receive "much less" than the maximum, and told him that "when you have a series of cases you probably get off lighter per case than you would if on one case" (R. (180) 6–7). He then imposed sentence as follows (R. (180) 7–8):

> The first count of indictment No. 10,676 is a charge of first uttering and publishing as well as having in possession, that is probably two different things, anyway I am just putting one year in each count, concurrent.
>
> No. 10,677 is breaking into a post office at Champaign, Illinois, the second count is stealing the money orders at the time. So, I am just putting that as two years on the first count and one year on the other, making it concurrent or making two years for that charge.

No. 10,678 I will have to start back, 10,678 as I have it now is corrected. In that you are charged with breaking into the post office at Nunnelley, Tennessee, secondly, stealing property from the postal department, which I assume to be the same offense. And, 10,678, two years on the first count, one year on the second count, concurrent. That is the way I have got that.

Now, No. 10,679, is breaking in two different post offices, one at Hurricane Mills and the other one at Nunnally, the same thing. I have No. 10,679 as two years on the first count, and one year on the second count concurrent.

No. 10,680, is a one-count indictment, breaking into the postoffice at Dukedom, Weakley County, two years on that.

No. 10,681, is from the Eastern District of Wisconsin, cashing two money orders as I get it. One year on each count, concurrent.

And then the last No. 10,682, breaking and entering the postoffice building in the Western District of Missouri that is two years, and all the different indictments will be consecutive. Now, let's see, that is thirteen years, is that correct?

GEN:L [*sic*] MEEK [*the prosecuting attorney*]: I figure twelve.

Mr. THRASHER [defense counsel]: I figure twelve.

CLERK: Thirteen is right.

THE COURT: I figure fourteen. One as I say it was involving the same instance, I took off one.

Did you get it Mr. Thrasher? 10,676, one year; 10,677, two years; 10,678, two years;

10,679, two years; 10,680, two years, 10,681 is two years; 10,682 is two years, consecutive as to all cases.

GEN:L [*sic*] MEEK: No. 10,681, how is that?

THE COURT: It is two years. I believe that is reasonable sentence in view of all the depredations. I do not believe in unusually long terms, but that is a pretty good term. I could easily hike that up to twenty years. That satisfies me. It is my best judgment nd my conscience is satisfied. That will be the judgment of the Court.

Subsequently, but on the same day, the judge signed, and there were filed, seven documents, each entitled "Judgment and Commitment" and each in the form suggested in Form 25, Appendix Of Forms, F.R. Crim. P. (Appendix, *infra*, pp. 39–48).[2]

The Judgment and Commitment in Criminal Case No. 10,676 committed petitioner to the custody of the Attorney General for imprisonment for a period of

---

[2] Although these documents were not part of the original record in *Payne*, they were considered by the Court of Appeals, the United States Attorney for the Eastern District of Tennessee having obtained them at the court's request. On December 29, 1960, each of these documents, with the exception of the Judgment and Commitment in No. 10,676, was certified as a part of the record by the clerk of the Court of Appeals. The clerk's office in the Court of Appeals has informed us that it is unable to locate the Judgment and Commitment in No. 10,676. We have contacted the clerk of the District Court for the Eastern District of Tennessee, who is preparing a certified copy which we will file with this Court upon receipt. Each of the Judgments and Commitments constituted the formal "judgment of conviction" referred to in Rule 32(b), F.R. Crim. P., and each is attached in the Appendix to this brief. *Infra*, pp. 39–48.

one year (Appendix, *infra,* pp. 39–40). The Judgment and Commitment in Criminal Case No. 10,677 committed petitioner for imprisonment for a period of two years "to begin at the expiration of the sentence imposed this day in Criminal Case No. 10,676" (Appendix, *infra,* p. 41). Similarly, the Judgments and Commitments in Criminal Cases Nos. 10,678 through 10,682, inclusive, committed petitioner for imprisonment for periods of two, two, two, one, and two years, respectively. Each Judgment and Commitment provided that the sentence therein contained would commence at the expiration of the sentence imposed that day in the case immediately preceding it numerically (Appendix, *infra,* pp. 42, 44, 45, 47, 48). The Judgment and Commitment in No. 10,682, after so providing, stated: "* * * making an aggregate sentence of TWELVE (12) YEARS TO BE SERVED in the seven criminal cases" (Appendix, *infra,* p. 48).

On January 14, 1959—less than three years after his confinement to the Alcatraz penitentiary—petitioner filed with the District Court for the Northern District of California a petition for a writ of habeas corpus (R. (180) 3), in which he asserted that the "oral judgment is too indefinite, ambiguous and equivocal to sustain consecutive sentences" (R. (180) 3), and that he had "satisfied the legal portion of his sentence" and was entitled to be discharged from custody (R. (180) 4). The district court denied the petition (R. (180) 11), holding that it was clear from the record that the sentencing court "in its judgment directed that petitioner be confined consecutively on the

several indictments for a total sentence of 12 years" (R. (180) 10).

Upon appeal, the Court of Appeals for the Ninth Circuit affirmed, stating (R. (180) 18-19):

> The district court thought that the oral pronouncement indicated with sufficient clarity that the consecutive sentences were to be served in the same sequence as the numerical order of the cases. If this is so, then the written judgment and commitments are in complete conformity with the oral sentences.
>
> Had the oral sentences been imposed with regard to the counts of a single indictment or information, we would have no hesitancy in concurring in this determination by the district court. [Citing *United States* v. *Daugherty,* 269 U.S. 360; *Fleish* v. *Swope,* 9 Cir., 226 F. 2d 310]. But where, as here, the consecutive sentences pertain to six informations and an indictment, there is authority for the view that a more precise specification of the order of sentences must be indicated than is to be found in the instant oral sentences. [Citing *Puccinelli* v. *United States,* 9 Cir., 5 F. 2d 6; *United States* v. *Patterson,* C.C., 29 Fed. 775]
>
> In providing that more precise specification of the order of sentences, the written judgments and commitments entered herein did not depart from the oral pronouncements. At most they resolved an ambiguity. In the oral pronouncements it was indicated that the sentences were to be served consecutively. The manner in which the pronouncements were made indicates that a sequence of sentences corresponding to the numerical order of the cases was probably intended. The written judgments

and commitments, signed by the judge on the same day, confirm this inference. In our view written judgments and commitments may properly serve the function of resolving ambiguities in orally pronounced sentences.

What we have said with respect to the sequence of sentences has equal application with regard to the clarification of the total time to be served, concerning which there was some confusion at the time of sentencing. * * *

II. *Young* v. *United States*, No. 184

On October 31, 1952, petitioner and his wife were sentenced by the District Court for the District of North Dakota on pleas of guilty to all counts of two informations (Nos. 8048 and 8052) and one indictment (No. 8136) (R. (184) 5, 6, 11).[3]

The prosecuting attorney, in a statement which petitioner's attorney termed "fair and impartial" (R. (184) 9), recounted a long list of burglaries, larcenies, robberies, and escapes committed by the defendants over the years (R. (184) 7, 8), referring to petitioner

[3] The information in No. 8048, filed October 31, 1951, contained two counts charging the defendants with jointly burglarizing post-offices in North Dakota, in violation of 18 U.S.C. 2115 (R.(184)1). The amended information in No. 8052, filed on November 30, 1951, charged petitioner in one count with the interstate transportation of a stolen vehicle, in violation of 18 U.S.C. 2312 (R.(184)2). The indictment in No. 8136, filed on September 27, 1952, contained three counts, the first charging the defendants with jointly transporting a stolen vehicle in interstate commerce, in violation of 18 U.S.C. 2312; the second charging petitioner, and the third, his wife, with escape from custody, in violation of 18 U.S.C. 751 (R.(184)3–4).

as having been "listed by the Federal Bureau of Investigation as one of the ten most wanted men" (R. (184) 8), and recommending that both defendants "be given the maximum penalty under the law. In the case against Young, that means 25 years. In the case against Mrs. Young, it means 20 years" (R.(184)9).

The sentencing judge, having declared that he was "of the opinion that the recommendation of the District Attorney is justified" (R. (184) 11), imposed sentence on the defendants as follows (R. (184) 11–12):

> Thomas Edward Young, it is the sentence of this Court that in case No. 8048, as to Count 1 you be confined * * * for a period of five years; that you also be confined on Count 2 for a period of five years. Margaret Rita Young, it is the sentence of this Court that you be confined * * * under Count 1 for a period of five years and under Count 2 for a period of five years.
>
> As to case No. 8052, in which you, Mr. Young, are the sole defendant, * * * it is the sentence of the Court that you be confined for a period of five years.
>
> As to case No. 8136, on Court [sic] 1, which charges the two of you jointly, it is the sentence of the Court that each of you be confined for a period of five years. On Count 2, you, Thomas Edward Young, it is the sentence of the Court that you be confined for a period of five years. On Count 3, it is the sentence of the Court that you, Margaret Rita Young be confined for a period of five years.

> It is the order of this Court that these sentences be served consecutively, which means for you, Mr. Young, a total sentence of 25 years and for you, Mrs. Young, a total sentence of 20 years.

On the same day as sentence was imposed, written Judgments and Commitments[4] were signed by the sentencing judge (R. (184) 13–19). In No. 8048, the Judgment and Commitment with respect to petitioner provided that the five-year sentences on each count were "to run consecutively with each other" (R. (184) 13). In No. 8052, in which petitioner was the sole defendant, the Judgment and Commitment, after setting forth the sentence, provided that it was "to commence at the expiration of the sentence * * * in Criminal Case No. 8048" (R. (184) 15). In No. 8136, the Judgment and Commitment with respect to petitioner, after setting forth the two five-year sentences imposed against him under Counts 1 and 2 of the indictment, provided that the sentences on the two counts were "to run consecutively" and that they were "to commence at the expiration of the sentence * * * in Criminal Case No. 8052" (R. (184) 16).

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[4] Each Judgment and Commitment was the formal "judgment of conviction" referred to in Rule 32(b), F.R. Crim. P., and was prepared in the form suggested in Form 25, Appendix of Forms, F.R. Crim. P. Compare the Statement, *supra*, p. 7.

On June 5, 1959, while both petitioner and his wife were confined in California institutions (R. (184) 20), they filed a motion in the sentencing court[5] to correct the Judgments and Commitments "to reflect that [all] the sentences imposed thereupon commenced to run on the date of imposition * * *" (R. (184) 20). The District Court denied the motion, concluding that the Judgments and Commitments "did no more than reflect the clearly expressed sentences imposed" (R. (184) 25); that they contained "no departure in any matter of substance" from the sentences imposed in open court (R. (184) 25); that "[t]he sentences were handed down in open court, case by case, and count by count" (R. (184) 28); and that it was the "clear and obvious intention and direction of the Court, as disclosed by the official proceedings in court and without reference to the judgments and commitments signed thereafter, that the sentences imposed upon Young and his wife were to be served in the order pronounced" (R. (184) 28).

An appeal was taken by both petitioner and his wife to the Court of Appeals for the Eighth Circuit (R. (184) 30). That court affirmed, holding that in dealing with each proceeding in its chronological order, and with each separate count in its numerical sequence, the sentencing judge's oral pronouncement left no ambiguity as to the order in which the sen-

[5] Although the motion was signed only by petitioner (R. (184) 20), the district court treated it as "having been made by both defendants" (R. (184) 21).

tences were to be served (R. (184) 32, 33), and that, as the trial court held, the Judgments and Commitments did not depart, except in form, from the oral pronouncement (R. (184) 33). The Court of Appeals also rejected a contention that the language in the Judgment and Commitment in No. 8048, stipulating that the sentences on the two counts contained therein were "to run consecutively with each other" (R. (184) 13, 17), was inoperative, and that these sentences therefore had to be regarded as concurrent (R. (184) 36).

## SUMMARY OF ARGUMENT

### I

There is no claim in the present cases that the sentencing courts in their oral pronouncements did not intend to impose consecutive sentences, but rather that those courts failed to specify the exact sequence in which the sentences were to be served so that the only alternative is to infer that the sentences were to run concurrently. According to *United States* v. *Daugherty*, 269 U.S. 360, 363, however, the lack of an express specification of the sequence of service of consecutive sentences in the sentencing judge's oral pronouncement does not render the sentences concurrent as a matter of law when the intent of the court as to the sequence can be ascertained by the "reasonable and natural implication from the whole entry."

The present cases fall squarely within the rationale of *Daugherty* since the oral pronouncements of the sentencing judges were sufficiently clear to impose

consecutive sentences to be served in the same sequence as the numerical order of the proceedings, particularly since each of the judges took up each proceeding, and, in *Young,* each count within each proceeding, separately in numerical order, and meted out punishment on them in the same order in which they were taken up.

The distinction urged by petitioners between sentences imposed on separate counts of a single indictment or information—a situation which, they concede, falls within the *Daugherty* rationale—and sentences imposed on multiple indictments or informations—a situation which, they aver, falls outside the scope of *Daugherty*—is a distinction without a difference, which has not been countenanced in the federal courts and which this Court should reject as artificial. Petitioners attempt to support this artificial distinction by urging that, because multiple counts of a single indictment denote various facets of the same transgression, the imposition of consecutive sentences on such counts may gain some illumination from the sequence of the counts in the indictment, but that there can be no such discernable relation among several indictments. That contention, however, fails to take account of the fact that whether or not the underlying offenses grew out of the same transaction is irrelevant to whether or not the order in which the sentences are to be served was sufficiently indicated. Moreover, the Federal Rules of Criminal Procedure do not supersede the *Daugherty* standard by imposing more exacting standards on the oral pronouncement of sentence.

## II

In a habeas corpus proceeding, such as *Payne,* the accuracy of the written Judgments and Commitments cannot be impeached, and the habeas corpus court is therefore without power to ascertain whether there is a variance between the written judgment and the oral pronouncement of sentence. Moreover, since the sole question in both cases is what the courts intended when they imposed sentence, the written Judgments and Commitments may at least be examined to cast light upon, and clarify any ambiguity in, the judges' intention in their oral pronouncements of sentence, much as legislative history is examined to help interpret the language of a statute. Use of the written Judgments and Commitments does not in any way violate a prisoner's right to be "present * * * at the imposition of sentence * * *."

When the written Judgments and Commitments in these cases are compared to the oral pronouncements of sentence, they confirm the intent of both sentencing judges to have the sentences served consecutively in order of their imposition, both with respect to the separate indictments and informations in *Payne* and *Young,* and with respect to the separate counts in the indictment and information in *Young.*

## III

In the event that the Government's substantive contentions are rejected, this Court should not direct that the prisoners be released. Since the sole question is whether the judges sufficiently specified the sequences

in which the consecutive sentences were to be served, the proper remedy would be to have the appropriate courts determine the intent of the sentencing judges with respect to the sequence in which the consecutive sentences were to be served, and to correct the written Judgments and Commitments, if necessary.

## ARGUMENT

### I

### THE ORAL PRONOUNCEMENTS FROM THE BENCH UNAMBIGUOUSLY IMPOSED CONSECUTIVE SENTENCES AND ADEQUATELY DISCLOSED THE RESPECTIVE SENTENCING COURTS' INTENT AS TO THE SEQUENCE OF SERVICE

#### A. *Both* Payne *and* Young *come within the standard established in* United States *v.* Daugherty

The standard for determining whether sentences which have been ordered by the sentencing judge to run consecutively are sufficiently clear as to the sequence in which they are to be served was announced in *United States* v. *Daugherty*, 269 U.S. 360. The district court in *Daugherty* had sentenced the defendant "for the term of five (5) years on each of said three counts * * *. Said term of imprisonment to run consecutively and not concurrently." *Id.* at 361. The court of appeals reversed, holding that the sentences should be given concurrent effect only, because of the absence of an express specification of the sequence in which the sentences were to be served. *Id.* at 362. In reversing the judgment of the court of appeals, this Court held that the lack of an express specifica-

tion of the sequence of service does not render sentences concurrent as a matter of law when the intent of the court as to the sequence can be ascertained by the "reasonable and natural implication from the whole entry." *Id.* at 363. Asserting that "[s]entences in criminal cases should reveal with fair certainty the intent of the court and exclude any serious misapprehensions by those who must execute them," the Court cautioned that "[t]he elimination of every possible doubt cannot be demanded," and went on to infer the sequence of service from the numerical order of the counts in the indictment, adding that the words " 'said term of imprisonment to run consecutively and not concurrently' " were "not consistent with a five-year sentence." *Ibid.*

In the present cases, it is equally "not consistent" with the actual intent of the sentencing courts to find that the directives of those courts must be considered to have imposed concurrent sentences. Petitioner in *Young,* however, insists that the only inference from the "sentencing pronouncement" is that it "authorizes no more than *five* years of imprisonment" (Pet. Br. (184) 14, fn. 11). But the sentencing court in *Young* ordered that the "sentences be served consecutively, which means for you, Mr. Young, a total sentence of 25 years * * *" (R. (184) 12).

Petitioner in *Payne* similarly insists that the only inference from the "sentencing pronouncement" is that it "authorizes no more than two years of imprisonment" (Pet. Br. (180) 22, fn. 23). But the

sentencing court in *Payne* expressly indicated that "all the different indictments will be consecutive" (R. (180) 7). It then summed up: "Did you get it, Mr. Thrasher [defense counsel]? 10,676, one year; 10,677, two years; 10,678, two years; 10,679, two years; 10,680, two years; 10,681 is two years; 10,682 is two years, *consecutive as to all cases*" (R. (180) 8) (emphasis added). When a question arose as to the total number of years imposed by the sentences, the following colloquy occurred (R. (180) 7–8):

> THE COURT: * * * Now, let's see, that is thirteen years, is that correct?
>
> GEN:L[sic] MEEK [the prosecuting attorney]: I figure twelve.
>
> Mr. THRASHER [defense counsel]: I figure twelve.
>
> CLERK: Thirteen is right.
>
> THE COURT: I figure fourteen. * * *

Obviously, in such circumstances, the court could hardly have intended to impose a sentence of only two years, for the question under discussion was whether the aggregate sentence was to be twelve, thirteen, or fourteen years. It was thus understood by all concerned that the court had imposed consecutive sentences.[6]

Presumably, petitioners cannot argue that the sentencing courts did not actually intend to impose

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[6] It should be stressed that the issue before this Court is not whether the total sentence imposed upon petitioner was twelve years, thirteen years, or fourteen years, but rather whether petitioner has a right to be released after serving only *two* years.

consecutive sentence; rather, they argue that, since the Courts failed to specify the exact sequence in which the sentences were to be served, the only alternative is to infer that the sentences were to run concurrently. But, in both cases, there is far more evidence of each judge's intent with respect to the sequence of service of the sentences than in *Daugherty,* where the sentencing judge merely imposed a term of "five (5) years on each of said three counts." 269 U.S. at 561. Thus, in each case there was a numerical sequence of the indictments and informations; each district court took up each proceeding in numerical order; each court then identified the proceeding by reciting its individual docket number, and pronounced sentence in that proceeding before taking up the next proceeding for consideration (R. (180) 7, 8; R. (184) 11). In addition, the court in *Young* took up each count in each proceeding in numerical order and imposed sentence on that count before considering the next count (R. (184) 11). In a word, as the district court in *Young* correctly observed, the sentences were announced "case by case, and count by count" (R. (184) 28). Finally, in *Payne,* the sentencing court, upon reaching the numerically final proceeding, identified it as "the last No. 10,682" (R. (180) 7), and immediately after imposing sentence in that proceeding declared that "all the different indictments will be consecutive" (R. (180) 7). The court then recapitulated, again taking up the proceedings in numerical order. It is thus clear from the record in each case that the "reasonable and natural implica-

tion from the whole entry" (*Daugherty,* 269 U.S. at 363) is that the intent of each sentencing court was to impose consecutive sentences to be served in the same sequence as the order in which they were imposed (see, *e.g.,* R. (184) 28). Indeed, no other implication can reasonably be made, for it would have made no sense for either of the sentencing judges to intend that the second, third or fourth sentence in order of imposition be served first, and the first last, or for the judge to intend any other sequence of service than that corresponding to the sequence in which the sentences were in fact imposed.

B. *There is no tenable distinction between sentences imposed on separate counts of a single indictment and sentences imposed upon separate indictments or informations*

1. Petitioners recognize that the *Daugherty* opinion "appears to permit the imposition of multiple consecutive sentences * * * despite the lack of * * * an express specification" of the sequence of service, where the sequence is indicated by the "'reasonable and natural implication' of the judge's pronouncement," and the sentences are imposed on "counts of a single indictment" (Pet. Br. (180) 13; see Pet. Br. (184) 10). They urge, however, that there is a significant distinction between sentences, imposed on separate counts of a single indictment, and sentences, such as those involved here, imposed upon separate indictments or informations. To support such a distinction, petitioners cite *United States* v. *Patterson,* 29 Fed.

775 (C.C.D.N.J.), decided in 1887—in which Mr. Justice Bradley, sitting on circuit, decided that a sentence "for the term of five (5) years upon each of the three indictments * * *, said terms not to run concurrently * * *" (*id.* at 776) was effective only to impose a term of five years—and claim that the *Daugherty* opinion "carefully distinguished and preserved the *Patterson* rationale" (Pet. Br. (180) 13).

Although the *Daugherty* opinion distinguished the *Patterson* case, it did not approve the *Patterson* rationale; failure of a court expressly to disapprove a decision does not compel an inference of approval. More fundamentally, with respect to the issue in the present cases, no tenable distinction can be drawn between sentences imposed upon separate indictments or informations and sentences imposed upon separate counts of the same indictment. As petitioners apparently realize (Pet. Br. (180) 14, fn. 13), since the *Daugherty* case was decided, many federal courts have either explicitly or implicitly recognized the artificiality of such a distinction, and accordingly have held that the *Daugherty* rationale governs sentences imposed in separate proceedings as well as on separate counts.[7] No decision to the con-

[7] *Barker* v. *Looney*, 261 F. 2d 616 (C.A. 10); *Ward* v. *United States*, 256 F. 2d 179 (C.A. 10); *Ward* v. *Looney*, 256 F. 2d 180 (C.A. 10); *Mills* v. *Hunter*, 204 F. 2d 468, 470 (C.A. 10); *Ziebart* v. *Hunter*, 177 F. 2d 847 (C.A. 10); *Seltenrich* v. *Sigler*, 228 F. 2d 615 (C.A. 5), certiorari denied, 350 U.S. 1001; *Kennedy* v. *Reid*, 249 F. 2d 492, 495 (C.A.D.C.); *Cole* v. *Sanford*, 48 F. Supp. 729 (N.D. Ga.).

trary has been found.[8] As the court of appeals said in *Young*, the mere fact that this Court distinguished *Patterson* in *Daugherty* hardly constitutes "any implied recognition or approval * * * of an absolute and artificial rule that, no matter what a court may have done and said in imposing sentences on separate indictments, such sentences cannot at all have any consecutive or successive operation, unless the court expressly specifies the sequence in which they are to be served" (R. (184) 35).

2. But even if the principle of the *Patterson* case had been adopted by this Court in *Daugherty*, it would not follow that on the facts of the present cases the *Patterson* rationale would apply. In *Patterson* there is no indication that the sentencing court took up each proceeding separately and in its numerical order; identified each proceeding by its individual docket number; or pronounced sentence in that pro-

[8] The court below in *Payne* cited *Puccinelli* v. *United States*, 5 F. 2d 6 (C.A. 9) as "authority for the view" that where the consecutive sentences pertain to different proceedings, as distinguished from different counts in the same proceeding, "a more precise specification of the order of sentences must be indicated than is to be found in the instant oral sentences" (R. (180) 18). In the *Puccinelli* case, which was decided before *Daugherty*, the sentencing court did not indicate whether the sentences were to be served consecutively or concurrently. The court later amended its judgment to provide that they were to be served consecutively. The sole issue was the validity of the amended judgment. The court's dictum (5 F. 2d 6, 7) as to the necessity of an express specification of the sequence of service cited, in addition to *Patterson*, the court of appeals opinion which was reversed by this Court in *Daugherty*.

ceeding before taking up the next proceeding for consideration. Thus, *Patterson* would have to be considerably extended in scope to support petitioners here. The result of such an extension, however, would be to ignore the clear and concrete evidence of the sentencing court's intent in each of the present cases, and to render the so-called *Patterson* rule even more arbitrary and unpersuasive.

3. Petitioners attempt to support the artificial distinction between multiple counts in a single indictment and multiple indictments or informations by asserting that, because multiple counts in a single indictment generally denote various facets of a single transgression, the imposition of consecutive sentences on such counts, "even if lacking meticulous precision, may gain some illumination from the sequence or contents of the indictment's several counts." They go on to urge that "[n]o comparable clarification * * * can result from multiple indictments consolidated for sentencing under Rule 20 of the Federal Rules of Criminal Procedure, where no discernible relation among the several indictments exists" (Pet. Br. (180) 14; see Pet. Br. (184) 10, and fn. 8).

This argument is wholly untenable. Whether or not the underlying offenses grew out of the same transaction is completely irrelevant to whether or not the order in which the sentences are to be served was sufficiently indicated. Petitioners' distinction presupposes that where the offenses grow out of a single transaction they are related in a manner which is significant for purposes of determining the sequence in which

the sentences imposed thereon should run. This presupposition in turn assumes (1) that from a relationship among offenses there may be implied a relationship among sentences imposed on such offenses, and (2) that the relationship among the offenses is chronological. The first assumption has no foundation whatever. The second assumption is hardly acceptable because the relationship among offenses which grow out of a single transgression derives from the circumstance that the offenses "are based on the same act or transaction" (Rule 8(a), F.R. Crim. P.). Moreover, petitioners err in assuming that multiple counts in a single indictment denote only various facets of a single transgression, for multiple "offenses may be charged in the same indictment or information in a separate count for each offense" even if the offenses "are of the same or similar character or are based * * * on two or more acts or transactions connected together or constituting parts of a common scheme or plan" (*ibid.*). In short, petitioners' distinction between sentences imposed upon counts of a single indictment and sentences imposed upon separate indictments or informations has no significance.

C. *The Federal Rules of Criminal Procedure do not supersede the* Daugherty *standard by imposing more exacting standards on oral pronouncements of sentence*

Petitioners argue, finally that the "wider rationale" of the *Daugherty* opinion appears to have been "superseded by the more exacting standards codified

two decades later by the Federal Rules of Criminal Procedure * * *" (Pet. Br. (180) 14; see Pet. Br. (184) 10). As the sole evidence of this alleged codification of "more exacting standards," they cite Form 25—Judgment and Commitment, Appendix of Forms, F.R. Crim. P., which suggests in footnote 4 to the form that, in the case of consecutive sentences, the entry on the Judgment and Commitment should contain language specifying "when each term is to begin with reference to termination of preceding term or to any other outstanding or unserved sentence * * *."

Petitioners do not dispute that the Judgments and Commitments in the present cases are in accord with Form 25. They say, however, that, although, under Rule 58, F.R. Crim. P., Form 25 is merely "illustrative and not mandatory," the Form nevertheless reflects an "authoritative judgment" that greater specificity is now appropriate in the *oral* pronouncement of sentence (Pet. Br. (180) 15; Pet. Br. (184) 10). From this it follows, petitioners say, that an illustrative form suggesting meticulous precision in the written Judgment and Commitment should be held to be "*mandatory*" under the present rules (Pet. Br. (180) 15), requiring the same degree of precision in an oral pronouncement from the bench, and therefore as in effect overruling the considered determination of this Court in *Daugherty*. In light of the many courts of appeals' decisions which have applied the *Daugherty* standard since the adoption of the Rules of Criminal Procedure (see footnote 7, *supra*, p. 22), petitioners' contention with respect to the present cases is clearly

without merit. A "stricter standard" than *Daugherty* has not been demanded. *Butterfield* v. *Wilkinson*, 215 F. 2d 320, 322 (C.A. 9).

## II

### THE WRITTEN JUDGMENTS AND COMMITMENTS ARE DISPOSITIVE IN *PAYNE*, OR IF NOT, ARE, AS IN *YOUNG*, AT LAST CLEAR EVIDENCE OF THE SENTENCING COURT'S INTENT TO HAVE THE SENTENCES SERVED CONSECUTIVELY IN ORDER OF THEIR IMPOSITION

Petitioners argue that the Judgments and Commitments have "no probative value" (R. (180) 17) and cannot be used to "amplify the judge's pronouncement of sentence" (Pet. Br. (180) 18; see Pet. Br. (184) 13) because, if they were to be used, that use would violate the provision in Rule 43, F.R. Crim. P., requiring a defendant to "be present * * * at the imposition of sentence * * *," and the provision in Rule 32(a), F.R. Crim. P., requiring the defendant to be afforded "an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment," since in reality the Judgments and Commitments were "prepared *ex parte*" (R. (180) 18).

#### A. *In the habeas corpus proceeding in* Payne, *the accuracy of the written Judgments and Commitments cannot be impeached*

Whatever may be the validity of petitioners' argument with respect to *Young*, it has no validity in *Payne*, where petitioner instituted a habeas corpus proceeding in the District Court for the Northern District of California to impeach the formal records

of the District Court for the Eastern District of Tennessee (R. (180) 3). For, in a collateral proceeding, there exists an "irrebuttable presumption" that the "judgment entered upon the records of the court" is true and "says what it was meant to say." *Hill* v. *United States ex rel. Wampler,* 298 U.S. 460, 464. In such a proceeding, therefore, the court is without power to ascertain whether there is a variance between the written judgment and the oral pronouncement of that judgment (*ibid.*); to accept an interpretation of the sentence which is "contradicted by the plain words of the recorded judgment" (*Greene* v. *United States,* 358 U.S. 326, 329); or to inquire as to whether the written judgment is the true judgment of the trial court (*Hill* v. *United States ex rel. Wampler, supra; Riddle* v. *Dyche,* 262 U.S. 333, 336; *Chapman* v. *United States,* 247 F. 2d 879, 881 (C.A. 6), certiorari denied, 356 U.S. 945; *Clark* v. *Memolo,* 174 F. 2d 978, 980–981 (C.A. D.C.)).

It is true that the Court of Appeals in *Payne,* relying on *Butterfield* v. *Wilkinson,* 215 F. 2d 320 (C.A. 9), held that "[h]abeas corpus * * * is the proper remedy" (R. (180) 15, fn. 1). But the reliance on *Butterfield* was misplaced, for the prisoner in that case, far from seeking to impeach the formal records of the sentencing court, rested his claim to release squarely upon such records. Since no issue of collateral impeachment of the sentencing court's records was involved, habeas corpus was the appropriate remedy. Here too, if petitioner in *Payne* had been content not to impeach the written judgment, habeas

corpus would have been the appropriate remedy, but relief would have properly been denied by the district court because, as will be shown (*infra*, p. 31), the Judgments and Commitments unambiguously set forth the sequence in which the consecutive sentences were to be served, as well as the length of the aggregate sentence. If, on the other hand, petitioner had wanted to call the validity of the written judgments into question, he should have filed a motion in the sentencing court, under Rule 36, F.R. Crim. P., invoking that court's inherent power to correct its own record (see *Hill* v. *United States ex rel. Wampler*, *supra*, 298 U.S. at 464), for it is the "trial court alone [which] has the power to make this record conform to the truth, if it does not do so" (*Meredith* v. *Gough*, 168 F. 2d 193 (C.A. 5), certiorari denied, 335 U.S. 873). Such a procedure was followed in *Young* (R. (184) 20).

B. *Even if the accuracy of the written Judgments and Commitments in both cases may be impeached by resort to the oral pronouncements of sentence, nevertheless the Judgments and Commitments may at least be used as evidence of the sentencing courts' intent*

Even if the courts in both cases had power to look to the oral pronouncements of sentence, since the sole question was what the sentencing courts intended when they imposed sentence, the courts below at least had the right to examine the written Judgments and Commitments to cast light upon, and clarify any ambiguity in, the judges' intention, much as legislative

history is examined to aid in interpreting the language of a statute. The Judgments and Commitments furnish at least "probative evidence" that the sentences as set forth therein conformed with the intent of each of the judges, particularly since the Judgments and Commitments in both cases were signed by the sentencing judges on the very same day that the sentences were imposed in open court (see Appendix, *infra*, pp. 39-48; R. (184) 13-19). Use of the written Judgments and Commitments to help understand the oral sentences could hardly raise any problems under Rules 32(a) and 43, F.R. Crim. P., since both petitioners were "present * * * at the imposition of sentence * * *" in open court, were afforded the "opportunity to make a statement in * * * [their] own behalf * * *," and were denied no substantive right when the sentences were imposed.

C. *With respect to the separate indictments and informations, the written Judgments and Commitments clearly confirm that the judges intended to have the sentences served consecutively in the order of their imposition.*

Petitioners rely heavily (Pet. Br. (180) 19) on this Court's declaration in *Hill* v. *United States ex rel. Wampler, supra,* 298 U.S. at 465, that "[a] warrant of commitment departing in matter of substance from the judgment back of it is void."[9]

[9] In 1936, when the *Hill* case was decided, however, the "warrant of commitment," or "mittimus," was a different document from the "judgment." The mittimus represented authority for commitment, while the "judgment," which preceded the

In the present cases, however, there was hardly any departure, or at least any departure of substance, between the oral pronouncements of sentence and the written Judgments and Commitments with respect to the separate indictments and informations. In *Payne*, the Judgment and Commitment in Criminal Case No. 10,677 specified that the sentence was "to begin at the expiration of the sentence imposed this day in Criminal Case No. 10,676" (Appendix, *infra*, p. 41). Similarly, each Judgment and Commitment in Criminal Cases Nos. 10,678 through 10,682, inclusive, provided that the sentence therein contained would commence at the expiration of the sentence imposed that day in the case immediately preceding it numerically (Appendix, *infra*, pp. 42, 44, 45, 47, 48). In *Young*, the Judgment and Commitment in Criminal Case No. 8052 provided that the sentence therein was "to commence at the expiration of the sentence * * * in Criminal Case No. 8048" (R. (184) 15), and the Judgment and Commitment in Criminal Case No. 8136 required the sentence therein "to commence at the expiration of the sentence * * * in Criminal Case

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mittimus in point of time, was the clerk's notation of the sentence in the minutes, which were later signed by the judge as a whole. Under present-day procedure, however, the "judgment" and the warrant of commitment are actually one and the same document. See Form 25, Appendix of Forms, F.R. Crim. P. The issue in the *Hill* case involved comparison of the warrant of commitment with the judgment, whereas the issue in the present cases involves comparison of the judgment with the oral pronouncement of sentence. See *Miller* v. *Sanford*, 161 F. 2d 291, 293 (C.A. 5); *Meredith* v. *Gough*, *supra*, 168 F. 2d 193 (C.A. 5).

No. 8052" (R. (184) 16). Thus, at least with respect to the separate indictments and informations in *Payne* and *Young*—as distinguished from the separate counts of the indictment and information in *Young*—the written Judgments and Commitments confirm the intent of both sentencing judges to have the sentences served consecutively in the order of their imposition. Petitioners themselves do not dispute this contention (*e.g.*, R. (180) 17).

D. *With respect to the separate counts in the indictment and information in* Young, *the written Judgments and Commitments similarly confirm the judge's intention*

It is clear from the written Judgments and Commitments in *Young*, that the judge intended to impose consecutive sentences on each count of the information and indictment, the sentences to run in order of their imposition. Thus in Criminal Case No. 8048, five-year sentences were imposed in order on each count in the Judgment and Commitment, which were "to run consecutively with each other" (R. (184) 13); and in Criminal No. 8136, five-year sentences were similarly imposed in order on each count in the Judgment and Commitment, which were "to run consecutively" (R. (184) 16).

Even petitioners admit that *Daugherty* "appears to permit the imposition of multiple consecutive sentences * * * despite the lack of * * * an express specification" of the sequence of service, where the sequence is indicated by " 'reasonable and natural im-

plication'," and the sentences are imposed on "*counts of a single indictment*" (Pet. Br. (180) 13 (emphasis added); see Pet. Br. (184) 10). But petitioner in *Young* suggests that "[t]he uncertainty left by the judge's directive was compounded by the obscure Judgment and Commitment in Case No. 8048 ordering the two sentences 'to run consecutively *with* each other' " (Pet. Br. (184) 11), for, petitioner insists, "separate sentences cannot be served * * * 'consecutive with each other' " (Pet. Br. (184) 11, fn. 9).

Although, to be sure, " '[c]onsecutive with' may be infelicitous * * *, [or] offend purists in the art of using prepositions idiomatically * * *, it is not a riddle. It is not illogical. It is not uncertain. It is not ungrammatical. American-English has wide play in the joints, and a predilection for a particular preposition to express a relationship may go against usage if the choice of preposition results in meaningful language." *Fulton* v. *United States*, 250 F. 2d 281, 282 (C.A. 5). As the court observed in *Hiatt* v. *Ellis*, 192 F. 2d 119, 120 (C.A. 5): "The word 'consecutive' * * * denotes 'following in a train, succeeding one another in a regular order'. The word 'with' * * * denotes primarily 'a relation of contact or association'. * * * It would be difficult to choose two words better able than the words employed here to put in brief compass the idea of cumulative service, the service of one sentence following in the train of, succeeding, the other sentence referred to." Accord, *Sutton* v. *United States*, 266 F. 2d 529 (C.A. 5);

See *Lipscomb* v. *Madigan*, 224 F. 2d 410 (C.A. 9), certiorari denied, 350 U.S. 939.[10] Moreover, when the written Judgment and Commitment in Criminal Case No. 8048 is read in the context of (1) the oral pronouncement of sentence, (2) the written Judgments and Commitments as they pertain to the separate indictment and informations, (3) the written Judgment and Commitment in Criminal Case No. 8136, which stated that the sentences on the two counts were "to run consecutively," and (4) the *Daugherty* standard, it is impossible to find, in the words of the district court in *Young*, either "serious uncertainty" or "uncertainty in any respect" (R. (184) 28). But even if there were "uncertainty," the proper remedy would be to have the written Judgment and Commitment corrected to effectuate the in-

[10] It is true that in *Bledsoe* v. *Johnston*, 154 F. 2d 458, 459 (C.A. 9), certiorari denied, 328 U.S. 872, upon which petitioner relies, the court stated in dictum that approximately the same language as that used in the present case was ineffective to create consecutive sentences. Later, however, the Ninth Circuit effectively overruled this dictum. *Butterfield* v. *Wilkinson*, 215 F. 2d 320, 322 (C.A. 9); *Henry* v. *Madigan*, 241 F. 2d 659, 660 (C.A. 9).

*Biddle* v. *Hall*, 15 F. 2d 840 (C.A. 8), upon which petitioner also relies, is wholly inapplicable. In that case sentences of one year were imposed in each of two cases to run "from this date" and "not to run" concurrently with the sentence imposed in the other case. The court of appeals held that it was "impossible to reconcile the provision in each sentence, that the term began on the day thereof, with the succeeding clause, that the sentence in each case was not to run concurrently with the sentence in the other" (*id.* at 841), and resolved the conflict in the prisoner's favor.

tent of the sentencing court to impose consecutive sentences in proper order, as reflected in the court's oral pronouncement. Accord, *Bledsoe* v. *Johnston*, 154 F. 2d 458 (C.A. 9), certiorari denied, 328 U.S. 872.

## CONCLUSION

For the foregoing reasons, the judgments of the courts of appeals should be affirmed.

In the event, however, that this Court should reject our contentions, it would neither be consistent with sound public policy nor necessary for the protection of petitioners' rights to direct that they be discharged after serving but a fraction of their aggregate terms of imprisonment, especially since Payne had committed "quite a serious series of violations" (R. (180) 6), and Young "was listed by the Federal Bureau of Investigation as one of the ten most wanted men" (R. (184) 8).[11]

Since there can be no doubt of the sentencing courts' intent in both cases to impose consecutive sentences (R. (180) 7, 8; R. (184) 12), the only appropriate remedy in *Young*—if petitioners should prevail—would be to remand with instructions to the district court (1) to determine the intent of the sentencing judge with respect to the sequence in which the consecutive sentences were to be served, and (2) to cor-

[11] "The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner." *Bozza* v. *United States*, 330 U.S. 160, 166–167; accord, *King* v. *United States*, 98 F. 2d 291, 296 (C.A. D.C.).

rect the written Judgments and Commitments, if necessary.[12]

With respect to *Payne*, if the Court should conclude that the issue had been properly raised in a habeas corpus proceeding, then it should remand to the district court "to dispose of the matter as law and justice require" (28 U.S.C. 2243), as the court would then have the power to do, and that disposal would be to direct that petitioner be returned to the sentencing court for the type of judicial determination suggested in *Young*.[13]

Such dispositions would not violate the Fifth Amendment's prohibition against double jeopardy. To be sure, as the petitioners assert, the sentencing court is "barred from sentencing petitioner anew so as to increase his sentence after its original imposition and start of service * * *" (Pet. Br. (180) 22,

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[12] Cf. *Downey* v. *United States*, 91 F. 2d 223, 233 (C.A. D.C.), where the sentences as entered by the clerk were ambiguous as to whether they were to run concurrently or consecutively. The court later corrected the record on the government's motion so as to make the sentences run consecutively. On appeal, the court of appeals held that, providing a fair judicial proceeding were held, such correction could be made. See also *Buie* v. *King*, 137 F. 2d 495 (C.A. 8).

[13] Cf. *In re Bonner*, 151 U.S. 242, 259–262, where this Court, on a petition for habeas corpus, held that the prisoner was being detained under a void sentence, but elected to "delay the discharge of the petitioner for such reasonable time as may be necessary to have him taken before the court where the judgment was rendered, that the defects for want of jurisdiction which are the subject of complaint in that judgment may be corrected." *Id.* at p. 261. See also *Wilson* v. *Bell*, 137 F. 2d 716, 719 (C.A. 6); *Price* v. *Zerbst*, 268 Fed. 72 (N.D. Ga.).

fn. 23; Pet. Br. (184) 14, fn. 11). But no *increase* in sentence would take place under the suggested procedure, since the only possible question concerns the sequence in which the consecutive sentences were intended by the sentencing courts to be served. Resolution of that question could not result in an increase in either of the petitioners' cumulative sentences.

Respectfully submitted.

ARCHIBALD COX,
*Solicitor General.*
JOHN DOAR,
*Acting Assistant Attorney General.*
RICHARD J. MEDALIE,
HAROLD H. GREENE,
DAVID RUBIN,
*Attorneys.*

FEBRUARY 1961.

# APPENDIX

(File Endorsement and Attestation Omitted)

Judgment and Commitment (Rev. 7–52)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENN., SOUTHERN DIVISION

No. 10,676

UNITED STATES OF AMERICA *v.* HARRY JOSEPH PAYNE

On this 16th day of March, 1956 came the attorney for the government and the defendant appeared in person and by attorney, and being advised of the nature of the charge and his rights, waived in open court prosecution by indictment and consented that the proceeding may be by information instead of by indictment.

IT IS ADJUDGED that the defendant has been convicted upon his plea of guilty of the offense of having uttered and published as true a forged, falsely made and counterfeited U.S. Money Order knowing same to be forged and falsely made; and had in his possession, with intent to utter and publish as true, falsely made, forged and counterfeited U.S. postal money orders, knowing the same to be falsely made and counterfeited, in violation of Title 18, U.S.C., Sections 500 and 494, as charged in the first and second counts of the information; and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no

sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ONE (1) YEARS, FROM AND AFTER THIS DATE, on each of the first and second counts of the Information, said sentences to run concurrently as to counts.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

LESLIE R. DARR,
*United States District Judge.*

* * * * *

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(File Endorsement and Attestation Omitted)

Judgment and Commitment (Rev. 7–52)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, SOUTHERN DIVISION

No. 10,677

UNITED STATES OF AMERICA *v.* HARRY JOSEPH PAYNE

On this 16th day of March, 1956 came the attorney for the government and the defendant appeared in person and by Attorney, and being advised of the nature of the charge and his rights, waived in open court prosecution by indictment and consented that the proceeding may be by information instead of by indictment.

IT IS ADJUDGED that the defendant has been convicted upon his plea of guilty of the offenses of having forcibly broke into and entered the Compton, Illinois Post Office, with intent to commit larceny, and did steal and knowingly convert to his own use certain property of the United States which had a total value in excess of $100.00, in violation of Title 18, USC, Sections 2115 and 641, as charged in the first and second counts of the information; and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court.

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO (2) YEARS ON THE FIRST COUNT; ONE YEAR ON THE SECOND COUNT; said sentences to run concurrently as to counts and to begin at the expiration of the sentence imposed this day in Criminal Case No. 10,676.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

LESLIE R. DARR,
*United States District Judge.*

* * * * *

(File Endorsement and Attestation Omitted)

Judgment and Commitment (Rev. 7–52)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, SOUTHERN DIVISION

No. 10,678

UNITED STATES OF AMERICA *v.* HARRY JOSEPH PAYNE

On this 16th day of March, 1956 came the attorney for the government and the defendant appeared in person and by Attorney, and being advised of the nature of the charge and his rights, waived in open Court prosecution by indictment and consented that the proceeding may be by information.

IT IS ADJUDGED that the defendant has been convicted upon his plea of guilty of the offenses of having forcibly broke into the Post Office at Nunnelly, Tennessee, with intent to commit larceny; and did steal property used by the Post Office Department, the value of which exceeded $100.00, in violation of Title 18, USC, Sections 1707 and 2115, as charged in the first and second counts of the Information; and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court.

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO (2) YEARS on the first count of the information, and ONE (1) YEAR on the second count, said sentences to run concurrently as to counts and to be-

gin at the expiration of the sentence imposed this day in Criminal Case No. 10,677.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

LESLIE R. DARR,
*United States District Judge.*

* * * * *

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(File Endorsement and Attestation Omitted)

Judgment and Commitment (Rev. 7–52)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, SOUTHERN DIV.

No. 10,679

UNITED STATES OF AMERICA *v.* HARRY JOSEPH PAYNE

On this 16th day of March, 1956 came the attorney for the government and the defendant appeared in person and by Attorney, and being advised of the nature of the charge and his rights, waived in open court prosecution by indictment and consented that the proceeding may be by information instead of by indictment.

IT IS ADJUDGED that the defendant has been convicted upon his plea of guilty of the offenses of having forcibly broke into a building used in part as a Post Office at Hurricane Mills, Tennessee, with intent to commit larceny; and did steal property used by the Post Office Department, the value of which exceeded $100.00, in violation of Title 18 USC, Section 1707 and 2115, as charged in the first and second counts of the Information; and the court having asked the

defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO (2) YEARS on the first count of the Information; ONE (1) YEAR on the second count, said sentences to run concurrently as to counts and to begin at the expiration of the sentence imposed this day in Criminal Case No. 10,678.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

LESLIE R. DARR,
*United States District Judge.*

* * * * *

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(File Endorsement and Attestation Omitted)

Judgment and Commitment (Rev. 7–52)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, SOUTHERN DIVISION

No. 10,680

UNITED STATES OF AMERICA *v.* HARRY JOSEPH PAYNE

On this 16th day of March, 1956 came the attorney for the government and the defendant appeared in person and by Attorney, and being advised of the nature of the charge and his rights, waived in open

court prosecution by indictment and consented that the proceeding may be by information instead of by indictment.

IT IS ADJUDGED that the defendant has been convicted upon his plea of guilty of the offense of having forcibly broke into a building used in part as the Postoffice, with intent to commit larceny and other depredations in said Postoffice, and did steal and take away therefrom a quantity of blank money order forms, a money order validating stamp and approximately the sum of Fifty-five ($55.00) Dollars in Postal Funds, in violation of Title 18, USC, Sec. 2115, as charged in the one count of the information; and the court having asked the defendant whether he has anything to say why judgment should not be pronounced; and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO (2) YEARS on the one count of the Information, said sentence to begin at the expiration of the sentence imposed this day in Criminal Case No. 10,679.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

LESLIE R. DARR,
*United States District Judge.*

* * * * *

(File Endorsement and Attestation Omitted)

Judgment and Commitment (Rev. 7–52)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, SOUTHERN DIV.

No. 10,681

UNITED STATES OF AMERICA *v.* HARRY JOSEPH PAYNE

On this 16th day of March, 1956 came the attorney for the government and the defendant appeared in person and by Attorney; and being advised of the nature of the charge and his rights, waived in open court prosecution by indictment and consented that the proceeding may be by Information instead of by indictment.

IT IS ADJUDGED that the defendant has been convicted upon his plea of guilty of the offenses of having falsely made, forged and counterfeited a money order in the sum of $100.00, with intent to defraud; and uttered and published as true a falsely made, forged and counterfeited money order in the sum of $100.00, knowing same to be falsely made, forged and counterfeited, in violation of Title 18, Section 500, as charged in the first and second counts of the Information; and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a pe-

riod of ONE (1) YEAR on each of the first and second counts of the Information, said sentences to run concurrently as to counts and to begin at the expiration of sentence imposed this day in Criminal Case No. 10,680.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

LESLIE R. DARR,
*United States District Judge.*

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(File Endorsement and Attestation Omitted)

Judgment and Commitment (Rev. 7–52)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, SOUTHERN DIVISION

No. 10,682

UNITED STATES OF AMERICA v. HARRY JOSEPH PAYNE

On this 16th day of March, 1956 came the attorney for the government and the defendant appeared in person and by Attorney, and being advised of the nature of the charge and his rights, waived in open court prosecution by indictment and consented that the proceeding may be by information instead of by indictment.

IT IS ADJUDGED that the defendant has been convicted upon his plea of guilty of the offenses of having knowingly, willfully, unlawfully and feloniously

broke into and attempted to break into a Post Office building, with intent to commit in said Post Office building larceny and other depredation, in violation of Title 18, Section 2115, as charged in the one count of the Information; and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO (2) YEARS on the one count of the Information, said sentence to begin at the expiration of the sentence imposed this day in Criminal Case no. 10,681, making an aggregate sentence of TWELVE (12) YEARS TO BE SERVED in the seven criminal cases.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

LESLIE R. DARR,
*United States District Judge.*

* * * * *

Office-Supreme Court, U.S.
FILED
FEB 21 1961
JAMES R. BROWNING, Clerk

PETITION NOT PRINTED

# IN THE SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1960**

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## No. 180

HARRY JOSEPH PAYNE,

*Petitioner,*

*vs.*

PAUL J. MADIGAN,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

---

## No. 184

THOMAS E. YOUNG,

*Petitioner,*

*vs.*

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

---

## REPLY BRIEF FOR THE PETITIONERS

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# IN THE SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1960**

---

## No. 180

HARRY JOSEPH PAYNE,

*Petitioner,*

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PAUL J. MADIGAN,

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## No. 184

THOMAS E. YOUNG,

*Petitioner,*

*vs.*

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

---

## REPLY BRIEF FOR THE PETITIONERS

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Rather than aiding the resolution of the vital problems of judicial administration acknowledged by this Court's grants of certiorari, the Justice Department's brief deals in legalisms without perceiving the heart of the case.

Fundamentally, petitioners maintain that federal judges must pronounce multiple sentences so as to inform a criminal defendant clearly when *each* sentence begins and ends, and that no clerical form prepared in the defendant's absence after the close of the judicial proceeding can cure ambiguous sentences pronounced by the judge in open court. Such minimal standards of civilized procedure are essential not only to protect the rights of criminal defendants and to preserve the dignity of the judicial sentencing function, but also to stem the flood of prisoners' post-conviction challenges to obscure sentencing pronouncements by federal judges.

The Department's brief, citing Mr. Justice McReynolds' 1926 opinion in the *Daugherty* case to legitimize the vague sentencing pronouncements at bar,[1] basically asserts that (1) criminal sentences may be fathomed from the judge's overall "intent," illuminated by the Judgment and Commitment form, as distinct from his recorded pronouncement in open court; (2) that unlawful imprisonment due to a variance between the judicial pronouncement and the clerical form may not be challenged by habeas corpus; and (3) that any ambiguities in the original sentencing should be redressed by resentencing so as to retrieve the judge's original "intent."

But, as will be shown below, (A) Criminal sentences rest on the judge's recorded pronouncement in open court, not

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[1] Content to endorse the post-*Daugherty* practice of the *lower* courts (Dept. Br. 26-27), the Department ignores whether reassessment of *Daugherty* may now be due in light of the experience of over thirty years. Particularly, the Department's rejection of Mr. Justice Bradley's *Patterson* rule as "arbitrary and unpersuasive" (Dept. Br. 29) overlooks that Form 25 of the Federal Rules of Criminal Procedure adopted in 1946 applies the *Patterson* standards to the Judgment and Commitment forms in *all* criminal proceedings.

on his unspoken "intent" or a clerical form signed after the close of the proceeding in the defendant's absence; (B) Habeas corpus is the historic legal remedy for prisoners incarcerated beyond the term authorized by the judge's sentencing pronouncement; and (C) An ambiguous sentence may not be cured by resentencing years later, but must be carried out as properly construed.

A. Criminal Sentences Rest on the Judge's Recorded Pronouncement in Open Court, Not on His Unspoken "Intent" or a Clerical Form Signed After the Close of the Proceeding in the Defendant's Absence.

Contrary to the Department's pervasive stress on the judge's "intent" (Dept. Br. 14-16-21, 29-30, 32, 34-35), "The only sentence known to the law is the sentence or judgment entered upon the records of the court." *Hill* v. *United States*, 298 U.S. 460, 464 (1936). Thus, "Final judgment in a criminal case means sentence. The sentence is the judgment." *Berman* v. *United States*, 302 U.S. 211, 212 (1937); *Parr* v. *United States*, 351 U.S. 513, 518 (1956). For "The court speaks through its judgment, and not through any other medium." *Hill* v. *United States*, 298 U.S. at 465.

By contrast, Judgment and Commitment forms, which ordinarily are prepared by the clerk and signed by the judge in the defendant's absence, are merely secondary evidence of the sentence or judgment. The clerk's judgment entry has always been "merely the formal evidence" of the judge's pronouncement from the bench, and the commitment is "the final process for carrying the judgment into effect." *Watkins* v. *Merry*, 106 F. 2d 360, 361 (10th Cir. 1939). The *combined* recordation of the judgment and the commitment warrant in a single form under Form 25 of

the Federal Rules of Criminal Procedure has neither revolutionized these functions, nor elevated the *ex parte* clerical entry to superior authority.[2]

Hence such ministerial forms cannot vary criminal sentences imposed in open court, but must reflect the judge's pronouncement "without addition or amendment." *Hill* v. *United States*, 298 U.S. at 466. And when such forms are prepared out of the defendant's presence by a clerk, they cannot rationally or properly "cast light upon, and clarify any ambiguity in, the judges' intention in their oral pronouncements of sentence, much as legislative history is examined to help interpret the language of a statute" (Dept. Br. 16).

Indeed, resort to Judgment and Commitment forms "to help understand the oral sentences" (Dept. Br. 30) degrades the judicial sentencing function, by subordinating the judge's solemn pronouncement in open court to a routine entry prepared in the defendant's absence by a clerk.

### B. Habeas Corpus Is the Historic Legal Remedy for Prisoners Incarcerated Beyond the Term Authorized by the Judge's Sentencing Pronouncement.

Only a fundamental confusion between the clerical form and the actual recorded judgment can account for the Department's belated and unprecedented claim that habeas

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[2] See, *e.g.*, *Gilliam* v. *United States*, 269 F.2d 770, 772 (D.C. Cir. 1959) ("order of judgment and commitment is merely evidence of this sentence"); *Spriggs* v. *United States*, 225 F.2d 865, 868 (9th Cir. 1955) ("The journal entry or signed document is not the order of the court. The order of the court is the pronouncement made by the judge in open court"). In fact, the Department itself agreed that "the oral pronouncement of sentence from the bench is the judgment of the court," so that in case of conflict "the transcript, which is the more reliable evidence, must prevail" (Dept. Opp. (180) 14).

corpus does not lie to challenge imprisonment in excess of the judge's sentencing pronouncement (Dept. Br. 27-29).

As recognized by the judicial consensus, imprisonment under a Judgment and Commitment which varies from the actual sentencing pronouncement may be tested either by a corrective motion under 28 U.S.C. § 2255 *or* by a writ of habeas corpus. On the one hand, a prisoner may move to correct his commitment form so as to square the execution of the sentence with the judicial pronouncement on which it rests.[4] Alternatively, since "A warrant of commitment departing in matter of substance from the judgment back of it is void," the courts for decades have understood that "its nullity may be established upon a writ of habeas corpus." *Hill* v. *United States*, 298 U.S. 460, 465 (1936),[5] and see, *e.g.*, *United States* v. *Patterson*, 29 Fed. 775 (C.C.D. N.J. 1887).[6]

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[3] At no point in the extended prior proceedings before the District Court, the Court of Appeals, or this Court did the Department impugn the jurisdiction of the habeas corpus court to adjudicate the issues raised by petitioner in *Payne*.

[4] Contrary to the Department's understanding (Dept. Br. 29), the Section 2255 procedure was followed in *Young* (R. 31). Accord: *e.g. Gaddis* v. *United States*, 280 F.2d 334 (6th Cir. 1960); *Dailey* v. *United States*, 259 F.2d 433 (7th Cir. 1958); *Ward* v. *United States*, 256 F.2d 179 (10th Cir. 1958).

[5] The Department's brief misunderstands the *Hill* case as involving a "comparison of the warrant of commitment with the judgment, *whereas the issue in the present cases involves comparison of the judgment with the oral pronouncement of sentence*" (Dept. Br. 30 n. 9). But since in *Hill* as well as in the instant cases the judge's recorded sentencing pronouncement was "identical with the sentence orally pronounced" and "the only variance complained of is between sentence and commitment," 298 U.S. at 464, the *Hill* issue precisely corresponds with the instant issue concerning a variance "between sentence and commitment" entered on the Judgment and Commitment form.

[6] See also, *e.g.*, *McIntosh* v. *Looney*, 249 F.2d 62 (10th Cir. 1957), *cert. denied*, 355 U.S. 935 (1958); *Seltenrich* v. *Sigler*, 228

Fundamentally, the Department's tardy and novel jurisdictional challenge to habeas corpus confuses the recorded judgment with the clerical form. For rather than "seeking to impeach the formal records of the sentencing court" (Dept. Br. 28), petitioners here are *relying* on the uncontroverted record of the judicial pronouncement in open court.

The Department's contention that the Judgment and Commitment form may be challenged *only* via the court's powers to correct "clerical mistakes" under Rule 36 of the Federal Rules of Criminal Procedure (Dept. Br. 29) is therefore baseless, and would defeat the historic writ which has been "left sufficiently elastic so that a court may, in the exercise of its proper jurisdiction, deal effectively with any and all forms of illegal restraint." *Price* v. *Johnston*, 334 U.S. 266, 283 (1948).

C. An Ambiguous Sentence May Not Be Cured by Resentencing Years Later, But Must Be Carried Out as Properly Construed.

Resentencing of prisoners held under an originally ambiguous pronouncement could sanction an unlawful increase in their confinement.

In both of these cases, the judge imposed *separate* sentences on diverse criminal indictments and counts. They are governed by the traditional principle that separate criminal sentences run from the time of their imposition—*unless clearly specified otherwise by the judge in his sen-*

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F.2d 615 (5th Cir. 1956), *cert. denied*, 350 U.S. 1001 (1956); *Zahn* v. *Kipp*, 218 F.2d 898 (7th Cir. 1955); *Butterfield* v. *Wilkinson*, 215 F.2d 320 (9th Cir. 1954); *Armstrong* v. *United States*, 210 F.2d 951 (6th Cir. 1954). Actually, no decision has been discovered which rejected habeas corpus to secure such an adjudication.

*tencing pronouncement. E.g., Gaddis* v. *United States*, 280 F. 2d 334 (6th Cir. 1960); *United States* v. *Chiarella*, 214 F. 2d 838 (2d Cir. 1954), *cert. denied*, 348 U.S. 902 (1954); *United States* v. *Patterson*, 29 Fed. 775 (C.C.D. N.J. 1887). By this principle, and as a matter of law, the vague oral pronouncements in these cases can authorize imprisonment only for the longest term of any of the *separate* sentences. There is no "total" or "aggregate" term within which the sequence of the several sentences may be shuffled. (Compare Dept. Br. 19, 37, with *Greene* v. *United States*, 358 U.S. 329 (1959).)

Consequently, any remand for resentencing which directs a longer confinement than authorized by the original and uncontroverted pronouncement by the judge, as *correctly construed*, would illegally expose these petitioners to double jeopardy.[7]

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[7] Petitioners never contended that the "only" inference (Dept. Br. 18) from the words of sentencing pronouncements is imprisonment for a shorter term, but rather that their continued detention was unauthorized by the obscure pronouncements if construed under the *Patterson* principle. Similarly distorted is the Department's statement of petitioners' ostensible position that sentences on multi-count indictments under Rule 8 denote "only" (Dept. Br. 25) facets of a single transaction, so as to justify differing legal treatment between multi-count and multi-indictment sentencing.

Remand of these proceedings is hardly supported by the citation (Dept. Br. 36) of *Downey* v. *United States*, 91 F.2d 223, 235 (D.C. Cir. 1937), directing a hearing where the sentencing judge might be a witness to resolve "a dispute of fact as to what the uttered, as distinguished from the entered, order of a judge was."

## Conclusion

Procedural fairness as well as effective judicial administration require that criminal sentences be imposed with dignity and clarity in open court—without resort to *ex parte* clerical forms "to help understand the oral sentences" (Dept. Br. 30).

Accordingly, and for the reasons outlined in petitioners' main briefs, the decisions below must be reversed.

Respectfully submitted,

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